

## Applicant Details

First Name **Ashley**  
 Middle Initial **D**  
 Last Name **Anderson**  
 Citizenship Status **U. S. Citizen**  
 Email Address [anderson2024@lawnet.ucla.edu](mailto:anderson2024@lawnet.ucla.edu)

|         |  |
|---------|--|
| Address | <b>Address</b><br><b>Street</b><br><b>530 Veteran Ave, 207</b><br><b>City</b><br><b>Los Angeles</b><br><b>State/Territory</b><br><b>California</b><br><b>Zip</b><br><b>90024</b><br><b>Country</b><br><b>United States</b> |
|---------|--|

Contact Phone Number **2515862869**

## Applicant Education

BA/BS From **Harvard University**  
 Date of BA/BS **May 2019**  
 JD/LLB From **University of California at Los Angeles (UCLA) Law School**  
[http://www.nalplawschoolsonline.org/ndlsdir\\_search\\_results.asp?lscd=90503&yr=2011](http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011)  
 Date of JD/LLB **May 10, 2024**  
 Class Rank **I am not ranked**  
 Does the law school have a Law Review/Journal? **Yes**  
 Law Review/Journal **No**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **National Native American Law Students Association Moot Court**

## Bar Admission

## Prior Judicial Experience

Judicial  
Internships/        **No**  
Externships  
Post-graduate  
Judicial Law       **No**  
Clerk

## Specialized Work Experience

## Recommenders

Riley, Angela  
Riley@law.ucla.edu  
(310) 206-3760

Llerandi, Mica  
llerandi@law.ucla.edu  
520-248-6643

Lauren, Van Schilfgaarde  
vanschilfgaarde@law.ucla.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**ASHLEY DAWN ANDERSON**

(251) 586-2869 • anderson2024@lawnet.ucla.edu • 530 Veteran Avenue, Los Angeles, CA 90024

June 12, 2023

The Honorable Beth Robinson  
United States Court of Appeals  
for the Second Circuit  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson,

I am a rising third-year student and a Graton Scholar at the UCLA School of Law, and I am writing to apply for a position as a law clerk in your chambers beginning in the fall of 2024. I am a citizen of the Cherokee Nation, hailing from Tahlequah, Oklahoma, and my background has fostered my passion for Native American and environmental law. I am particularly interested in a clerkship in Burlington because I lived in Boston for six years and would love to return to New England.

My academic experiences will allow me to excel in your chambers. I graduated from Harvard College with a degree in History and Literature, which equipped me with strong critical thinking, research, and writing skills. This interdisciplinary background, along with my legal education at UCLA Law, allows me to approach complex legal issues from a well-rounded perspective.

My practical experience has also prepared me to be an effective law clerk. Through UCLA's Tribal Legal Development Clinic, I volunteered with the Hualapai Nation Court of Appeals, where I researched and drafted bench memoranda on civil and criminal cases for Justice Stacy Leeds and Justice Carole Goldberg. I have also interned for the Natural Resources Defense Council and the Environmental Law Institute, where I engaged in extensive analysis of statutes, regulations, and case law, refining my research, interpretation, and application skills.

Thank you for your time and consideration. I have enclosed my resume, transcript, and writing sample, as well as letters of recommendation from Professor Angela Riley, Professor Lauren van Schilfgaarde, and Professor Mica Llerandi. I look forward to hearing from you.

Sincerely,  
Ashley Dawn Anderson

## ASHLEY DAWN ANDERSON

(251) 586-2869 • anderson2024@lawnet.ucla.edu • 530 Veteran Avenue, Los Angeles, CA 90024

### EDUCATION

#### **UCLA School of Law**, Los Angeles, CA

J.D. expected May 2024 | GPA: 3.9 (second year); 3.6 (cumulative)

**Honors:** Graton Scholarship (full-tuition scholarship and stipend for students committed to Native law)  
Cherokee Nation Graduate Scholarship  
Masin Academic Excellence Gold Award (highest grade in Art & Cultural Property Law)  
31st NNALSA Moot Court Competition, *Best Written Advocate, 3rd Place*

**Leadership:** Native American Law Students Association, *Co-President, Alumni Chair, & Inter-Org Chair*

**Clinics:** El Centro Reentry Legal Clinic, *Volunteer*

#### **Harvard University**, Cambridge, MA

B.A. in History & Literature, May 2019

**Honors Thesis:** *Alienating Aesthetics and the Existential Critique of Modernity in 2001: A SPACE ODYSSEY*

**Honors:** Cherokee Nation Undergraduate Scholarship

**Leadership:** Native Americans at Harvard College, *Secretary & Community Outreach*

**Study Abroad:** Harvard Summer Program in Prague, Czech Republic, Summer 2017

### EXPERIENCE

#### **Environmental Law Institute**, Washington, D.C.

Summer 2023

*Summer Law Clerk*

#### **UCLA Tribal Legal Development Clinic**, Los Angeles, CA

Spring 2023

*Clinical Student, Hualapai Appellate Project*

- Researched tribal and state law to write bench memoranda for the Hualapai Nation Court of Appeals.
- Drafted court orders for Justice Leeds and Justice Goldberg.

#### **UCLA California Environmental Legislation and Policy Clinic**, Los Angeles, CA

Fall 2022

*Clinical Student, California 30x30 Project*

- Interviewed 14 stakeholders involved in California 30x30 (a plan to conserve 30% of the state's land and coastal waters by 2030) to analyze the plan's effectiveness.
- Wrote a white paper reporting research and policy recommendations to inform future lawmaking.

#### **Natural Resources Defense Council**, Remote

Summer 2022

*Legal Intern, San Francisco Litigation Team*

- Researched and wrote legal memoranda on environmental review under the California Environmental Quality Act for an appellate brief.
- Investigated facts and reviewed administrative records to support an environmental justice case.

#### **MIT Center for Transportation & Logistics**, Remote

December 2020 – August 2021

*Data Annotator*

- Organized data from hundreds of visual media samples with keen attention to detail.

#### **The Public Schools of Brookline**, Brookline, MA

January 2020 – March 2020

*Substitute Teacher*

- Fulfilled short-term assignments across all K–12 subject areas, focusing on special education.

### INTERESTS

Beading, painting, creative writing, Shakespeare, hiking, and birdwatching.

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University of California, Los Angeles  
LAW Student Copy Transcript Report

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Student Information

Name: ANDERSON, ASHLEY DAWN  
UCLA ID: 005844194  
Date of Birth: 03/10/XXXX  
Version: 08/2014 | SAITONE  
Generation Date: June 05, 2023 | 11:49:53 AM  
This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021  
SCHOOL OF LAW  
Major:  
LAW

Degrees | Certificates Awarded

None Awarded

Previous Degrees

None Reported

California Residence Status

Nonresident

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**Fall Semester 2021**

Major:  
LAW

|                             |            |            |            |            |
|-----------------------------|------------|------------|------------|------------|
| CONTRACTS                   | LAW 100    | 4.0        | 13.2       | B+         |
| INTRO LEGL ANALYSIS         | LAW 101    | 1.0        | 0.0        | P          |
| LAWYERING SKILLS            | LAW 108A   | 2.0        | 0.0        | IP         |
| Multiple Term - In Progress |            |            |            |            |
| PROPERTY                    | LAW 130    | 4.0        | 12.0       | B          |
| CIVIL PROCEDURE             | LAW 145    | 4.0        | 12.0       | B          |
|                             |            | <u>Atm</u> | <u>Psd</u> | <u>Pts</u> |
|                             | Term Total | 13.0       | 13.0       | 37.2       |
|                             |            |            |            | <u>GPA</u> |
|                             |            |            |            | 3.100      |

**Spring Semester 2022**

|                             |            |            |            |            |
|-----------------------------|------------|------------|------------|------------|
| LGL RSRCH & WRITING         | LAW 108B   | 5.0        | 18.5       | A-         |
| End of Multiple Term Course |            |            |            |            |
| CRIMINAL LAW                | LAW 120    | 4.0        | 13.2       | B+         |
| TORTS                       | LAW 140    | 4.0        | 13.2       | B+         |
| CONSTITUT LAW I             | LAW 148    | 4.0        | 13.2       | B+         |
| ENVIRONMNTL JUSTICE         | LAW 165    | 1.0        | 0.0        | P          |
|                             |            | <u>Atm</u> | <u>Psd</u> | <u>Pts</u> |
|                             | Term Total | 18.0       | 18.0       | 58.1       |
|                             |            |            |            | <u>GPA</u> |
|                             |            |            |            | 3.418      |

**Fall Semester 2022**

|                     |            |            |            |            |
|---------------------|------------|------------|------------|------------|
| FEDERAL INDIAN LAW  | LAW 267    | 3.0        | 12.0       | A          |
| PUB NATURAL RESOURC | LAW 293    | 4.0        | 13.2       | B+         |
| ART&CULTURL PROP LW | LAW 301    | 3.0        | 12.9       | A+         |
| CA ENVRN LEGSLTN    | LAW 738    | 5.0        | 20.0       | A          |
|                     |            | <u>Atm</u> | <u>Psd</u> | <u>Pts</u> |
|                     | Term Total | 15.0       | 15.0       | 58.1       |
|                     |            |            |            | <u>GPA</u> |
|                     |            |            |            | 3.873      |

**Spring Semester 2023**

|                     |            |            |            |            |
|---------------------|------------|------------|------------|------------|
| ADMINISTRATIVE LAW  | LAW 216    | 3.0        | 9.9        | B+         |
| INDIVIDUAL RESEARCH | LAW 340    | 3.0        | 12.9       | A+         |
| INDIVIDUAL PROJECT  | LAW 345    | 2.0        | 8.0        | A          |
| INDIGENOUS PPL INTL | LAW 444    | 3.0        | 11.1       | A-         |
| TRIBAL LEGAL DEV    | LAW 728    | 4.0        | 16.0       | A          |
|                     |            | <u>Atm</u> | <u>Psd</u> | <u>Pts</u> |
|                     | Term Total | 15.0       | 15.0       | 57.9       |
|                     |            |            |            | <u>GPA</u> |
|                     |            |            |            | 3.860      |

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**Memorandum**  
Masin Family Academic Gold Award  
ART&CULTURL PROP LW, s. 1, 22F

**LAW Totals**

|                           | <u>Atm</u> | <u>Psd</u> | <u>Pts</u> | <u>GPA</u> |
|---------------------------|------------|------------|------------|------------|
| Pass/Unsatisfactory Total | 2.0        | 2.0        | N/a        | N/a        |
| Graded Total              | 59.0       | 59.0       | N/a        | N/a        |
| Cumulative Total          | 61.0       | 61.0       | 211.3      | 3.581      |
| Total Completed Units     | 61.0       |            |            |            |

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UCLA

SANTA BARBARA • SANTA CRUZ

ANGELA R. RILEY  
PROFESSOR OF LAW  
DIRECTOR, NATIVE NATIONS LAW AND POLICY CENTER  
Phone (310) 206-3760  
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UCLA SCHOOL OF LAW  
Box 951476  
385 Charles E. Young Drive, East  
Los Angeles, California 90095-1476

June 1, 2023

*Re: Letter of Recommendation in Support of Ashley Anderson's Application for Judicial Clerkship*

Dear Judge:

I write this letter in emphatic and enthusiastic support of Ms. Ashley Anderson's application for a position as a judicial clerk. I recruited Ms. Anderson from Harvard undergrad to come to UCLA School of Law as an inaugural Graton Scholar. She was one of three incoming students to receive this prestigious award, which was made possible by the Federated Indians of the Graton Rancheria. Thus, I have known Ms. Anderson for more than two years, having taught her in several classes and having worked with her extensively through the Native American Law Students Association (NALSA), among other organizations. She received an A in my Federal Indian Law course and an A+ (as the #1 student) in my Art and Cultural Property Law course. She is an absolute stand out intellect, a leader, a hard worker, and a true star. She will make a terrific judicial clerk. With due respect, my recommendation is that you hire her as swiftly as possible, lest she get away!

Ms. Anderson has a unique background that she brings to her study of law. Growing up in the rural country near Tahlequah, Oklahoma, she is a citizen of the Cherokee Nation, which has shaped much of her personal experience and driven her passion to work in the intersecting field of Indigenous rights and environmental law. She attended a Cherokee school before going off to Harvard undergrad. Since coming to UCLA, she has exceeded all expectations as a Graton Scholar. Her file is replete with concrete evidence that she has the intellectual chops to be a great clerk. She mined every possible opportunity UCLA had to offer in her areas of interest, taking a host of courses at the intersection of Indigenous rights, environmental justice, and others. From large lecture courses to small seminars and everything in between, Ms. Anderson's academic performance has been outstanding. She has embraced opportunities to be a student leader through her positions in NALSA, participated in the NALSA moot court competition, and attended conferences where she engaged with leaders in the field, in addition to so many other feats. Through it all, she has balanced these activities and her legal education with grace and a quiet confidence that is rare in law students.

Ms. Anderson is also an outstanding student. She stood out in both Federal Indian Law and Art and Cultural Property Law, where (as I mentioned) she earned an A+. Ms. Anderson always contributed thoughtfully and with great insight, with a clear passion for Indigenous issues. She has an incredibly brilliant mind and curiosity about law and solving complex. Moreover, she is collaborative, kind, and curious.

In addition to all these superlatives, the truth is that Ms. Anderson is a delightful person. She is the kind of energetic, curious, thoughtful and kind lawyer you want to work with, day in and day out. I am honored to have had the privilege to get to know her as a student and a person and to have had her in my classes. More importantly, she has been a pillar of recruiting and has worked alongside me in building the program we are growing here at UCLA through the Native Nations Law and Policy Center (which I direct). I have called on her to recruit the next wave of Graton Scholars, appear before tribal council when requested, have dinner

June 1, 2023

Page 2

with tribal leaders, and be an emissary for our program, which she has done with a generous spirit and the utmost professionalism.

In short, I give her my absolute highest possible recommendation. You will not regret hiring her, I am sure.

Please do not hesitate to contact me with questions or concerns. If you need to reach me telephonically, please call my mobile at: 310.739.4069. If it is urgent, also please send a text message letting me know you would like to speak with me.

Sincerely,

Angela R. Riley  
Professor of Law  
Director, Native Nations Law and Policy Center

UNIVERSITY OF CALIFORNIA, LOS ANGELES

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385 Charles E. Young Drive East  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
PHONE: (310); FAX: (310) 206-1234  
E-MAIL:

May 25, 2023

Dear Judge,

I am writing this letter in enthusiastic support of Ashley Anderson's application for a clerkship in your chambers. I have had the pleasure of getting to know Ms. Anderson during her second year of law school; she was a student in my class, the Tribal Legal Development Clinic ("Clinic"), and I oversaw the competition of her substantial academic writing requirement. I also served as her coach for Moot Court and a faculty advisor for the Native American Law Students Association ("NALSA"), where she was co-President. Based on my experiences with Ms. Anderson, I can give her my highest recommendation as a candidate for a clerkship.

During the seminar portion of the Clinic, Ms. Anderson consistently put forward articulate, engaging, and thoughtful dialogue. As a consistent participant, Ms. Anderson's posed challenging questions and shared insightful perspectives on topics of the day. She also demonstrated excellent analytic and writing skills in the clinic project – reviewing tribal court appellate cases and writing bench memos and draft opinions for tribal court justices – and in her substantial academic writing on the tribal rights-of-nature movement. In both writing assignments, she was thorough and hard-working and exhibited strong legal research skills.

I have also observed Ms. Anderson's talents outside of the classroom as the NALSA co-President. In this role, Ms. Anderson was meticulously organized and mature in her communication skills with both law school faculty, staff, and students. In her role, she deftly coordinated trips for 20+ students and smoothly handled all challenges with tact and grace. Ms. Anderson has not shied away from responsibility but leaned into her role with spirit and sophistication. She has proven her high level of functioning through her varied talents in and out of the classroom and it is a complete pleasure to work with her.

I have no doubt that Ms. Anderson would be an extremely effective law clerk. She would bring outstanding written, oral, and analytical skills, along with a pleasant demeanor, to the position. If I can be of any further assistance in your review of her application, please feel free to contact me.

Sincerely,

*Mica R. Llerandi*

**Mica R. Llerandi**

*San Manuel Band of Mission Indians Director, Tribal Legal Development Clinic*

Phone: (520)248-6643

[llerandi@law.ucla.edu](mailto:llerandi@law.ucla.edu)



LAUREN VAN SCHILFGAARDE  
ASSISTANT PROFESSOR

SCHOOL OF LAW  
BOX 951476  
LOS ANGELES, CALIFORNIA 90095-1476  
Phone: (310) 794-7344  
Email: vanschilfgaarde@law.ucla.edu

May 19, 2023

Dear Judge,

It gives me great pleasure to write this letter of recommendation for Ashley Anderson for consideration of a judicial clerkship in your chambers. Ashley is an eager and analytic student who is clearly on a path towards impassioned advocacy. I have found her work to be consistent and sophisticated, while her demeanor is calming yet enthusiastic. I am certain she would make a valuable contribution to your work.

Ashley took my Indigenous Peoples in International Law course in Spring 2023. The course was an atypical law school course in that its primary focus was non-American sources of law. Ashley was a devoted and engaged student. She asked lots of questions and weaved concepts and doctrines from previous class sessions into the day's new material. Her intellectual engagement consistently advanced the class discussion.

Also in Spring 2023, Ashley participated in the National Native American Law Students Association (NALSA) moot court competition, an annual event drawing students from across the country. Competition is increasingly fierce and is typically reserved for third-year students as the subject-matter regards advanced federal Indian law. Despite the intimidating prospects, Ashley dived in, and alongside her partner received third place for best written brief! This is no small achievement, not just because of the significant competition, but also because she was permitted no faculty guidance and had to draft over winter break just after having completed her fall semester finals. As reflected by her award, the brief was in fact a concise, well-written analysis of the complex issues, and a accurate reflection of her glowing analytic and drafting capacity. I had the pleasure of helping to coach her team, serving as a practice judge. The burden of preparing for a moot court competition in addition to the regular course load can be daunting. But Ashley was always present and displayed a remarkable transformation over the course of the two months of practice. Her oral advocacy skills grew exponentially—giving me all the more confidence in her legal potential.

Ashley is active leader within NALSA and is a Graton scholar, a three-year full-tuition scholarship sponsored by the Federated Indians of the Graton Rancheria intended for students studying Indian law. As a Graton scholar, Ashley is tasked with engaging with both law school and Tribal leadership in addition to navigating her studies. She has always been present, engaging, and has served as an ideal diplomat. She has additionally been incredibly driven in advocating for the next generation of Indian law students, actively helping to recruit new students, mentoring first years, and generally being available in ways that many other students find tedious or demanding. Her natural and humble leadership style can sometimes obscure her prominence. She wordlessly identifies what needs to be done and executes. She is, simply, an ideal member of the community.

Page 2

In sum, I wholeheartedly recommend Ashley for a clerkship in your chambers. She is quick, sophisticated, meticulous, and deeply kind. Not only is she sure to advance the necessary research and drafting tasks before her, but she is likely to identify and innovate on issues previously unnoticed. Moreover, she is a pleasure to be with—advocating for herself and those around her in ways that seem to always benefit all. I warmly welcome any questions.

Sincerely,

A handwritten signature in dark ink, reading "Lauren van Schilfgaarde". The signature is written in a cursive, flowing style.

Lauren van Schilfgaarde  
Assistant Professor  
UCLA School of Law  
[vanSchilfgaarde@law.ucla.edu](mailto:vanSchilfgaarde@law.ucla.edu)

Ashley Dawn Anderson  
530 Veteran Ave, Apt 207  
Los Angeles, CA 90024  
(251) 586-2869

### **WRITING SAMPLE**

This is my independently written argument section from the brief my teammate and I submitted for the 31<sup>st</sup> National NALSA Moot Court Competition, which is an annual competition where students address a novel federal Indian law problem in a brief and in an oral competition. We won 3<sup>rd</sup> Best Brief.

The questions presented for competition were:

1. Is Randall's Indian status sufficient to render him subject to the Minneshonka Nation's power of eminent domain?
2. Does the Minneshonka Nation have the inherent authority to protect Minneshonka Cane on non-member fee lands within the Minneshonka Reservation?

My teammate and I separately addressed the questions presented. I addressed the second issue, whether a fictional tribe retained jurisdiction to regulate a fictional plant. The following sample is wholly my own work, and it has been modified to provide context in some sections. I can provide the full brief or question packet upon request.

*I. The Nation Has the Inherent Sovereignty to Protect the Cane on Nonmember Fee Land Within Its Reservation Because It Retains All Powers Necessary for Self-Government and Territorial Management*

Randall's Indian status notwithstanding, the Minneshonka Nation ("the Nation") has inherent authority over Randall's fee land within the Minneshonka Reservation ("the Reservation") boundaries because tribes have sovereignty over "*their territory*." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added); *see Williams v. Lee*, 358 U.S. 217, 223 (1959) (stating that this Court has consistently affirmed tribes' sovereignty over their reservations). A tribe retains all aspects of sovereignty that are neither expressly abrogated by Congress nor inconsistent with its dependent status. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress has not acted to take away the Nation's right to protect Minneshonka Cane ("Cane") on nonmember fee land within the Reservation, and this right is not divested due to the Nation's dependent status because it is consistent with federal policy and necessary for tribe's subsistence, health, welfare, and political integrity. *See Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 153–54 (1980); *see also Montana v. United States*, 450 U.S. 544, 564 (1981). Thus, even if Randall is considered a "nonmember" outsider for jurisdictional purposes, the Nation has jurisdiction over his land because it retains inherent sovereignty to protect the Cane on all nonmember fee land within its Reservation. Additionally, the Nation also retains the inherent sovereignty to protect the Cane on Randall's property in particular because he consented to the Nation's jurisdiction.

*A. The Nation, as a Sovereign, Has Inherent Authority Over Its Territory, Which Has Not Been Abrogated or Implicitly Divested*

As a sovereign, the Nation can regulate nonmember fee land within the Reservation boundaries because it has the inherent powers necessary for self-government and territorial management. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *see also Babbitt*

*Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 592 (9th Cir. 1983). As with its power of eminent domain, the Nation also retains the authority to protect the Cane on nonmember fee land because it has not been expressly abrogated by Congress nor has it been implicitly divested. *Wheeler*, 435 U.S. at 323.

*I. Congress Has Not Abrogated the Nation's Power to Protect the Cane on Nonmember Fee Land Within Its Reservation*

Only Congress can abrogate an inherent sovereign power, which it must express unequivocally in statute, and courts are not permitted to lightly assume Congress acted contrary to its policy of fostering tribal governance. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). Congress has not demonstrated its unequivocal purpose to undermine tribal governance; however, the Thirteenth Circuit concluded that the General Allotment Act (“the Allotment Act”) divested the Nation of aspects sovereignty over its territory. R. at 11. This finding is inconsistent with this Court’s precedent.

The Nation’s sovereignty over its territory was not withdrawn by the Allotment Act because it does not contain Congress’s unequivocal intent to do so. Rather, the Allotment Act resulted in nothing more than allowing non-Indians to own land in the Reservation. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356 (1962). Further, the Allotment Act was repudiated by the Indian Reorganization Act of 1934. 25 U.S.C.A. § 5101 (West); *Mattz v. Arnett*, 412 U.S. 481, 497, n. 18 (1973). The Allotment Act did not divest tribes of the sovereignty to pass land use laws regulating nonmember fee land. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 464 (1989) (Blackmun, J., dissenting).

Recently, this Court reaffirmed that the Allotment Act was not a “total surrender of all tribal interests” in the allotted parcels. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020). In

reasoning that the Allotment Act did not divest tribal sovereignty over allotted parcels, the Court in *McGirt* analogized the Allotment Act to the various homesteading acts where the federal government transferred title of federal land to private individuals. *Id.* Since transferring federal land to private fee title did not divest the federal government of its sovereignty over those lands, the Court analogizes, neither should the Allotment Act be construed to have divested tribes of their sovereignty over the allotted lands within their reservations. *Id.* Thus, Congress has not acted to divest the Nation of its inherent sovereignty to protect the Cane on nonmember fee land within its Reservation.

2. *The Nation's Protection of the Cane on Nonmember Fee Land Within Its Reservation Is Consistent With the Interests of the Federal Government*

A tribe's inherent sovereignty is only implicitly divested when that sovereignty is inconsistent with the interests of the federal government, such as entering into treaties with foreign nations. *Colville*, 447 U.S. at 153–54. Civil jurisdiction over nonmembers within the reservation is consistent with a tribe's dependent status and an important part of tribal sovereignty. *Brendale*, 492 U.S. at 455 (Blackmun, J., dissenting); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). This Court has found that powers necessary for self-government and territorial management are consistent with the federal government's interest of promoting tribal self-governance and that land use laws are the “ultimate instrument” of those powers. *Brendale*, 492 U.S. at 458 (Blackmun, J., dissenting); see *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983).

The Nation's protection of Cane on nonmember fee land within its Reservation is consistent with the interests of the federal government. The federal government has the “firm” policy of encouraging tribal self-sufficiency and economic development. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (finding that a state tax on timber sales to

nonmembers on the reservation was contrary to the federal policy of revitalizing tribal self-governance). As the Minneshonka Tribal Code recognizes, the Cane is necessary for the Nation's way of life, economic activity, medicine, and subsistence. M.T.C. Sec. 401(A). Further, the Nation's livelihood is so intertwined with the Cane that the decline of Cane correlated with the decline of the Nation's well-being. R. at 4. Protecting the Cane will also foster the Nation's economic development because it is essential to the citizens' economic aspirations. *Id.* at 16. For example, the Nation's traditional artisans depend on the availability of Cane in order to pursue their craft because the Cane is the fundamental material used in basketry and weaving. *Id.* at 3. Thus, the regulation is not only consistent with federal policy it is *necessary* for the advancement of federal Indian policy.

The Nation's ability to protect the Cane also advances the federal government's anti-pollution efforts. The EPA granted the Nation Treatment-as-a-State ("TAS") status under the Clean Water Act. R. at 4. This status is a recognition, not a delegation, of the Nation's inherent sovereignty to pass water-quality regulations "to the full extent permitted under Federal Indian law." *See Montana v. United States EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998) (finding that the EPA's granting of TAS status to a tribe is based on the agency's determination of the tribe's inherent regulatory authority over non-consenting nonmembers). The Nation adopted planting Cane as a Best Management Practice ("BMP") to fulfill the federal mandates of the Clean Water Act. R. at 4. The Nation invested significant effort in maximizing the health and diversity of the Cane population throughout the Reservation. *Id.* The Nation even engineered Cane brakes that absorbed heavy metals and toxic pollutants from water sources. *Id.* The Nation's practice of planting the Cane would be ineffective if there were no way to prevent destruction of the Cane, thereby thwarting the federal anti-pollution policies. *See Confederated Salish & Kootenai Tribes*

of *Flathead Rsr., Montana v. Namen*, 665 F.2d 951, 963-64 (9th Cir. 1982) (holding that the tribes had the sovereign authority to regulate the riparian rights of nonmembers on the reservation because this power was consistent with federal interests and advanced federal anti-pollution policies). Therefore, the Nation's Personhood Easement is necessary for the advancement of federal policy.

The Nation has not been implicitly divested of its inherent sovereignty to protect the Cane on nonmember fee land within the Reservation because the regulation is consistent with the overriding interests of the federal government. To judicially divest the Nation of this inherent sovereignty would be contrary to federal policy. As this Court has "repeatedly emphasized," only Congress has the authority to limit tribal sovereignty, and judicial interference in Indian affairs must be restrained. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978).

3. *The Nation Retains Its Inherent Sovereignty to Protect Cane on Nonmember Fee Land Because the Regulation and Nonmember Conduct Are Distinct from Montana*

The Nation retains the inherent sovereignty to protect the Cane on its Reservation, even on nonmember fee land, because its regulation is distinct from the "discriminatory" regulation in *Montana v. United States* and necessary for self-government. *Brendale*, 492 U.S. at 443; see 450 U.S. 544, 564 (1981). The Court in *Montana* held that a tribe had been implicitly divested of the inherent sovereignty to prohibit nonmembers from hunting and fishing on nonmember fee land because the regulation did not bear "a clear relationship self-government or internal relations." 450 U.S. at 564. However, the Nation's regulation is so distinct from *Montana* that it is evident the Nation retains the inherent authority to regulate nonmember fee land in order to preserve a resource necessary for the Nation's welfare and self-government.

In *Brendale*, five justices found that the tribe could regulate nonmember fee land within the reservation for zoning purposes. 492 U.S. at 444. Although the justices issued separate opinions describing their rationales behind the decision, a majority agreed that the tribe's land use regulation was distinct from the hunting and fishing prohibition in *Montana*. See *Brendale*, 492 U.S. at 443 (Stevens, J., concurring) and at 458-59 (Blackmun, J., dissenting). Justice Stevens distinguished the tribe's zoning law from the law in *Montana* in three ways: 1) the law in *Montana* treated nonmembers and members unequally, but the zoning law in *Brendale* applied equally to nonmembers and members; 2) the Court in *Montana* found there was no threat to the welfare of the tribe, but the nonmember's development project in *Brendale* threatened the welfare of the tribe; and 3) the State in *Montana* had a significant interest in the land and water the tribe sought to regulate, but there were no state or county interests at stake in *Brendale*. *Id.* at 443-44. For the same reasons and more, the Nation's land use law is distinct from *Montana*.

Unlike the law in *Montana*, which applied unequally to nonmembers, the Nation's regulation applies to nonmembers and members equally. The Personhood Easement applies on all properties within the Reservation where the Cane is located, and the Cane exists on land owned by members and nonmembers alike. R. at 13; M.T.C. Sec. 401(B). Similar to the nonmember in *Brendale*, Randall is seeking a "special, privileged status," which distinguishes this case from *Montana*. 492 U.S. at 443. The Minneshonka Department of Cultural and Ecological Resources identified 100 properties where the easement would apply, and ninety-nine of those property owners, including nonmembers, supported the regulation. R. at 14-15. While Randall rejected all the Nation's offers of compensation for encumbering his property with an easement necessary to protect the Cane, several nonmembers gifted the Easements to the Nation. *Id.* at 14. Randall is the only person seeking exemption from the Nation's regulation. *Id.*

Additionally, unlike the regulation in *Montana*, the Nation's regulation does not prohibit a nonmember from hunting or fishing on their own property. Rather, the Nation merely seeks to limit uses that would harm the Nation's non-human relative. *Id.* at 16. Randall may do whatever he wants with his property as long as he does not harm the Cane. This is a modest regulation imposed on someone who has the privilege of living in the Nation's territory and taking advantage of its services.

*Montana* is not analogous to the present situation because the Nation seeks to regulate nonmember conduct that threatens the Nation's welfare. In *Montana*, the Court found the tribe could not regulate nonmember conduct on fee land because there was no evidence the nonmember conduct would imperil the tribe's welfare. 450 U.S. at 566. In *Brendale*, however, the Court reached the opposite conclusion based on the finding that the nonmember's development project would threaten the tribe's cultural and spiritual values and, thus, impact the tribe's general health and welfare. 492 U.S. at 443. Similarly, nonmember conduct that would harm the Cane, such as Randall's development project, threatens the Nation's health and welfare. Even more, the destruction of Cane is akin to destroying the tribe's cultural and spiritual values because the tribe's culture, ceremonies, religion, medicine, and "all other aspects of life," depend on the "existence...and permanence" of the Cane. M.T.C. Sec. 401(A). Thus, the Nation's regulation bears a clear relationship to self-government because it is imperative to the Nation's culture, religion, health, and welfare.

In determining that a tribe could not regulate nonmember fishing and hunting on nonmember fee land within the reservation, the *Montana* Court relied on the fact that the tribe had historically accommodated itself to the State's "near exclusive" hunting and fishing regulations on those lands. 450 U.S. at 566. The Court also relied on the fact that the State

supplied fish and game on the reservation. *Id.* at 548. The Court in *Brendale* distinguished from *Montana* by finding there were no state or local interests asserted in the case. 492 U.S. at 444. Similarly, there is no state or local interest in conflict with the Nation’s regulation. In order to recover from the loss of 98% of Cane following the Columbian Encounter, the Nation, not the state or local government, planted the Cane and fostered conditions for its propagation. *R.* at 3-4. Additionally, there is no similar state or local law that would protect the Cane; in fact, the Court of Appeals called the Nation’s regulation “novel.” *Id.* at 11. The Nation recognized that it is responsible for the protection of the Cane, which is why it enacted this regulation. *Id.* at 16. Unlike *Montana*, this regulation solely concerns the Nation’s management of its territory; therefore, this regulation bears a clear relationship to self-governance.

This case is also distinct from *Montana* because the EPA has already determined that the Nation has the inherent sovereignty to regulate water quality on all land within its Reservation. *See United States EPA*, 137 F.3d at 1141. By granting the Nation TAS status, the EPA recognized that the Nation’s inherent sovereignty encompasses all government functions necessary to regulate the water quality within the Reservation boundaries. *See* 33 U.S.C.A. § 1377(e) (West); *see also* Hillary M. Hoffmann, *Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism*, 97 Or. L. Rev. 353, 389 (2019). Using its inherent sovereignty, the Nation adopted planting and protecting Cane as a BMP to improve water quality. *See City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996) (holding that, because of its inherent sovereignty, a tribe may regulate water quality more stringently than the federal government). The Personhood Easement is a necessary extension of this BMP because the Nation’s environmental efforts would be futile if the Cane were not protected.

The Nation retains the inherent sovereignty to protect the Cane on nonmember fee land within its Reservation because, distinct from *Montana*, the Nation's regulation is inextricably intertwined with its self-governance.

*B. The Nation Retains Its Inherent Sovereignty to Protect the Cane on Nonmember Fee Land Under Both Montana Exceptions*

The Nation also retains the inherent sovereignty to protect the Cane on its Reservation, even on nonmember fee land, because both *Montana* exceptions apply. The Nation retains inherent authority to protect the Cane on all nonmember fee land within its Reservation because the regulation is necessary to protect the health and welfare of the Nation, and the Nation has the inherent sovereignty to protect the Cane on Randall's property, in particular, because Randall entered into a consensual relationship with the Nation.

*1. The Nation Retains the Inherent Sovereignty to Protect the Cane on Nonmember Fee Land Within the Reservation Because the Cane Is Imperative to the Nation's Health, Welfare, Subsistence, and Political Integrity*

Tribes retain the inherent sovereignty to regulate the uses of and conduct on nonmember fee land when the use or conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Lower courts have found that nonmember conduct that threatens tribes' natural resources or sites of cultural significance fall under this sovereign authority because that conduct imperils the tribes' political integrity, health, and welfare. *See FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916, 935 (9th Cir. 2019); *see also Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1103 (S.D. Cal. 2008).

In *Knight v. Shoshone and Arapahoe Indian Tribes of Wind River Reservation, Wyoming*, the court held that the tribes had inherent sovereignty under the *Montana* analysis to enforce a

land use law affecting the entire reservation, including nonmember fee land, because the law regulated conduct that directly affected the general welfare of all residents on the reservation. 670 F.2d 900, 903 (10th Cir. 1982). The court found that the tribes could regulate the nonmember fee land because the tribal law sought to preserve and protect the reservation from exploitation and because there was not a similar state or local law within the reservation that would protect tribal interests. *Id.*

Similar to how the tribes in *Knight* could regulate nonmember land use within their territory because noxious uses of nonmember fee land threaten neighboring tribal land and resources, the Nation can also regulate nonmember fee land in order to protect the Cane. 670 F.2d at 903. Historical evidence and modern research demonstrate that the Cane, which only grows near water sources, purifies the nearby water and air by capturing pollutants. R. at 3-4. The Cane on Randall's property is especially important for water quality because it serves as a buffer between the fertilized farmland and the lake, preventing erosion, siltation, and nonpoint source nutrient pollution. *Id.* at 4. Destroying the Cane will worsen the air and water quality for everyone on the Reservation because they are common resources, not contained within property lines. See *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (9th Cir. 1981) (finding that the tribe could regulate nonmember water uses because water is a "unitary system" where "the actions of one user have an immediate and direct effect on other users"). Further, this Court has already recognized that the inability to uniformly manage land uses on the reservation threatens the health and welfare of a tribe, such that the tribe necessarily must exercise jurisdiction over fee land. *Brendale*, 492 U.S. at 460 (Blackmun, J., dissenting). Therefore, the Nation retains the inherent sovereignty to protect the Cane on nonmember fee land in order to preserve air and water quality and, thus, health and welfare throughout the Reservation.

In *Knight*, the court found that the tribal land use ordinance over nonmembers was valid because it regulated conduct that threatened the tribes' use of the reservation as a homeland. 670 F.2d at 903. Similarly, the Nation's Personhood Easement is necessary, even on nonmember fee land, because destruction of the Cane would imperil the Nation's use of its Reservation as a sufficient homeland. The Cane is a necessary part of the ecosystem on the Reservation; the Cane brakes provide habitats for various species, like migratory birds, which sustain the Minneshonka people. R. at 3. Destroying the Cane on private property will also destroy the habitats of these species, directly affecting the health and welfare of the people who depend on these species for subsistence. *Id.* Additionally, the Nation's citizens depend on the Cane for food in times of scarce resources, and destruction of the Cane will deprive the Nation of this natural resource. *Id.*; see *Governing Council of Pinoleville Indian Cmty. v. Mendocino Cnty.*, 684 F. Supp. 1042, 1045 (N.D. Cal. 1988) (holding that the tribe could regulate nonmember fee land on the reservation in order to halt a development project because its impact on wildlife habitats and the tribe's food sources would directly affect the tribe's health and welfare). Therefore, the Nation's ability to protect the Cane everywhere on the Reservation is necessary for the health and welfare of the Nation and its citizens.

In *Knight*, the tribes successfully demonstrated their sovereignty to regulate the nonmember fee land by showing that the land was located near important tribal areas, including traditional ceremonial grounds and tribal institutions. 670 F.2d at 903. The Nation's regulation is even more necessary for the protection of important tribal areas than in *Knight* because the Nation's regulation protects the actual important tribal areas themselves, not just the areas *near* important cultural sites. The Cane is central to the Nation's culture and religion, so the Cane brakes themselves are the areas of cultural significance. M.T.C. Sec. 401(A). Further, protecting

the Cane by granting it personhood status, thereby removing the right of property owners to harm the Cane, is necessary for the Nation's culture and cosmology. M.T.C. Sec. 401(D). It follows that the Nation has the inherent sovereignty to regulate nonmember fee land where the Cane grows in order to protect these important cultural areas because, without this law, development projects like Randall's will destroy the Cane, threatening the Nation's welfare and political integrity. *See Quechan*, 535 F. Supp. 2d at 1103 (finding the tribe had jurisdiction over non-Indians who permanently scarred cultural sites because destruction of these sites threatened the tribe's welfare and political integrity).

Similar to the tribal land use law in *Knight*, which was also justified because there was no similar law regulating the reservation lands, the Nation's law is necessary to fill a legal void. 670 F.2d at 903. First, the Nation seeks to regulate a lake that is not subject to state water laws, so the Nation's water quality regulations, including its BMP of planting and sustaining the Cane for its ability to uptake pollution, are necessary to protect the lake for the use of everyone on the Reservation. *Id.* at 8. The United States Fish and Wildlife Service refused to list the Cane as an endangered species, not because it was not threatened, but because the agency reasoned that the Cane's economic and environmental potential would foster its propagation. *Id.* at 4. The Nation's regulation is a response to this agency inaction; while economic forces will drive its propagation, there must be a legal mechanism to protect the Cane after its propagation. *Id.* at 5. Thus, the Personhood Easement is an act of tribal self-governance stemming from the Nation's inherent sovereignty.

The Nation's ability to protect a culturally and environmentally important resource does not fall within the holding of *Strate v. A-1 Contractors*, where the Court held that a tribe lacked jurisdiction over a traffic accident between nonmembers on a state highway traversing the

reservation. 520 U.S. 438, 442 (1997). Applying the *Montana* test, the Court found that, although reckless driving could impact the safety of tribal members, this particular incident did not bear a close enough relationship to tribal self-government to warrant tribal jurisdiction. *Id.* at 458. The holding in *Strate* does not control this case because a land use regulation enacted in order to protect the subsistence, culture, health, and welfare of the tribe is wholly unlike a traffic incident between nonmembers on a small stretch of highway. Additionally, the Ninth Circuit has already found that the scenario in *Strate* in no way approaches the threat to a tribe's health and welfare like that posed by the impairment of water quality. *See United States EPA*, 137 F.3d at 1141. Further, unlike jurisdiction over the accident in *Strate*, this regulation is necessary for tribal self-government because there is not a similar law protecting the Cane and thereby protecting the health, welfare, culture, religion, subsistence, and economic security of the Nation and its citizens.

Thus, even under this Court's strictest interpretation of inherent sovereignty articulated in *Strate*, the Nation retains the power to protect the Cane on nonmember fee land within the Reservation.

2. *The Nation Has the Inherent Sovereignty to Protect the Cane on Randall's Property Because He Entered a Consensual Relationship with the Nation*

[Omitted]

*Conclusion*

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that 1) Randall's standing with the Nation is sufficient to subject him to its inherent power of eminent domain, or, alternatively, 2) the Nation has the inherent authority to protect the Cane on nonmember fee land, including Randall's property.

**Applicant Details**

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|----------------------|--|
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**Applicant Education**

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|-----------------------|--|
| BA/BS From            | Yale University  |
| Date of BA/BS         | May 2016   |
| JD/LLB From           | University of California, Berkeley<br>School of Law<br><a href="https://www.law.berkeley.edu/careers/">https://www.law.berkeley.edu/careers/</a> |
| Date of JD/LLB        | May 10, 2024   |
| Class Rank            | School does not rank   |
| Law Review/Journal    | Yes  |
| Journal(s)            | Berkeley Journal of Employment and<br>Labor Law  |
| Moot Court Experience | No   |

**Bar Admission****Prior Judicial Experience**

|                                      |     |
|--------------------------------------|-----|
| Judicial Internships/<br>Externships | Yes |
|--------------------------------------|-----|

Post-graduate Judicial Law Clerk **No**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

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June 12, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year student at Berkeley Law, and I am writing to express my interest in clerking in your chambers from 2024 to 2025. I am particularly interested in working for you because I hope to learn from a judge who is committed to serving and protecting even the most disenfranchised members of the community.

In law school, I externed for Justice Liu of the California Supreme Court. I enjoyed the fast-paced and autonomous nature of the work, which involved a wide variety of civil and criminal matters. My conversations with Justice Liu and his clerks convinced me that I would greatly enjoy clerking. The experience also helped me develop the research and writing skills expected of a clerk.

This summer, I am working at a plaintiffs' firm focused on employment discrimination and civil rights. Throughout law school, I have devoted my time to fighting for local workers through Berkeley's Union Grievance Assistance Project and Wage Justice Clinic. These projects were sobering reminders of how much work remains to be done to protect marginalized workers, and they cemented my commitment to a career in the public sector.

Before law school, I earned an undergraduate degree in literature at Yale, where I also served as an editor for the student paper. After completing a master's degree in medieval studies, I worked as a paralegal at a large plaintiffs' firm specializing in consumer and employment class actions.

I hope to continue honing my legal writing skills by clerking for a judge who shares some of these values. After clerking, I plan to spend my career advocating for low-wage workers and consumers at a private public interest firm or a government agency.

Respectfully,



Jane Balkoski

## Jane Balkoski

2741 College Avenue, Berkeley, CA 94705 | 415.535.5799 | jane.balkoski@berkeley.edu

### EDUCATION

#### University of California, Berkeley, School of Law, Berkeley, CA

J.D. expected, May 2024

Honors: Jurisprudence Award: Torts (highest scoring exam), Best Brief: Written & Oral Advocacy (highest scoring brief), Dean's Fellowship (merit scholarship)  
2023 Academic Distinction: top 5% of class; 2022 Academic Distinction: top 25% of class  
Activities: *Berkeley Journal of Employment and Labor Law*, Union Grievance Assistance Project, Wage Justice Clinic

#### Trinity College, Dublin, Ireland

M.Phil. in Medieval Studies, April 2019

Dissertation: "The Book of Nature: Margins and Miniatures of CBL M 94"

*Worked 20-40 hours/week to finance education.*

#### Yale University, New Haven, CT

B.A., *cum laude*, in Literature, May 2016

Honors: Wright Prize (best descriptive, imaginative or journalistic article), Scott Prize (best essay in French), Kernan Prize, honorable mention (best senior essay in Literature department)

Activities: *Yale Daily News*, Yale College Writing Center, Peabody Museum of Natural History

### EXPERIENCE

#### Sanford Heisler Sharp, Palo Alto, CA

May 2023 to Aug. 2023

*Summer Associate*

Write demand letters and mediation briefs on behalf of clients who have experienced discrimination, retaliation, and wage theft. Correspond with clients. Prepare for depositions and mediations. Cite check briefs.

#### Chambers of Justice Liu, California Supreme Court, San Francisco, CA

Jan. 2023 to Apr. 2023

*Extern*

Analyzed petitions for review and provided recommendations. Drafted bench memoranda regarding circulating opinions. Cite checked opinions. Completed legal research projects.

#### University of California, Berkeley, School of Law, Berkeley, CA

Aug. 2022 to May 2023

*Legal Research and Writing / Written and Oral Advocacy Tutor*

Provided first-year students with feedback on legal research projects. Led practice oral argument sessions. Judged final first-year oral argument competition.

#### Department of Justice, Antitrust Division, San Francisco, CA

May 2022 to July 2022

*Volunteer Intern*

Produced memoranda regarding legal issues, including the advice-of-counsel defense. Completed legislative history research projects. Reviewed documents.

#### Lieff Cabraser Heimann & Bernstein, New York, NY

Jan. 2020 to July 2021

*Paralegal / Case Clerk*

Investigated potential cases for products liability practice group. Answered class members' questions about settlements. Coordinated with settlement administration companies. Drafted administrative motions.

### SKILLS & INTERESTS

**Languages:** Fluent French, proficient Italian

**Interests:** Keen baker and avid hiker

Sophia J Balkoski  
Student ID: 3037256931  
Admit Term: 2021 Fall

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Page 1 of 2

Academic Program History  
Major: Law (JD)

Cumulative Totals 31.0 31.0

### Awards

Written & Oral Advocacy: Best Brief 2022 Spr

| 2021 Fall         |   |       |           |       |  |
|-------------------|---|-------|-----------|-------|--|
| Course            | Description                               | Units | Law Units | Grade |  |
| LAW 200F          | Civil Procedure<br>Linda Krieger          | 5.0   | 5.0       | HH    |  |
| LAW 201           | Torts<br>Talha Syed                       | 4.0   | 4.0       | HH    |  |
| LAW 202.1A        | Legal Research and Writing<br>Cheryl Berg | 3.0   | 3.0       | CR    |  |
| LAW 202F          | Contracts<br>Asad Rahim                   | 4.0   | 4.0       | P     |  |
| Term Totals       |   | 16.0  | 16.0      |       |  |
| Cumulative Totals |   | 16.0  | 16.0      |       |  |

| 2022 Fall         |   |       |           |       |  |
|-------------------|---|-------|-----------|-------|--|
| Course            | Description   | Units | Law Units | Grade |  |
| LAW 231           | Crim Procedure-<br>Investigations<br>Erwin Chemerinsky  | 4.0   | 4.0       | HH    |  |
| LAW 243           | Appellate Advocacy<br><b>Fulfills Writing Requirement</b><br>Alexandra Robert-Gordon            | 3.0   | 3.0       | HH    |  |
| LAW 247.11        | Consumer Financial<br>Regulation<br><b>Fulfills 1 of 2 Writing Requirements</b><br>Manisha Padi | 3.0   | 3.0       | HH    |  |
| LAW 252.2         | Antitrust Law<br>Prasad Krishnamurthy   | 4.0   | 4.0       | H     |  |
| Term Totals       |   | 14.0  | 14.0      |       |  |
| Cumulative Totals |   | 45.0  | 45.0      |       |  |

| 2022 Spring |  |       |           |       |  |
|-------------|--|-------|-----------|-------|--|
| Course      | Description  | Units | Law Units | Grade |  |
| LAW 202.1B  | Written and Oral Advocacy<br><b>Units Count Toward Experiential Requirement</b><br>Cheryl Berg | 2.0   | 2.0       | HH    |  |
| LAW 203     | Property<br>Molly Van Houweling  | 4.0   | 4.0       | H     |  |
| LAW 220.6   | Constitutional Law<br><b>Fulfills Constitutional Law Requirement</b><br>Erwin Chemerinsky      | 4.0   | 4.0       | P     |  |
| LAW 230     | Criminal Law<br>Andrea Roth  | 4.0   | 4.0       | H     |  |
| LAW 284.42  | Credit Reporting&Economic<br>Just<br>Erika Heath   | 1.0   | 1.0       | CR    |  |
| Term Totals |  | 15.0  | 15.0      |       |  |

| 2023 Spring       |  |       |           |       |  |
|-------------------|--|-------|-----------|-------|--|
| Course            | Description  | Units | Law Units | Grade |  |
| LAW 289A          | Judicial Externship Seminar<br><b>Units Count Toward Experiential Requirement</b><br>Erin Liotta<br>Sharon Djemal<br>Susan Schechter | 1.0   | 1.0       | CR    |  |
| LAW 295.8B        | Judicial Externships: Bay Area<br><b>Units Count Toward Experiential Requirement</b><br>Susan Schechter                              | 11.0  | 11.0      | CR    |  |
| Term Totals       |  | 12.0  | 12.0      |       |  |
| Cumulative Totals |  | 57.0  | 57.0      |       |  |

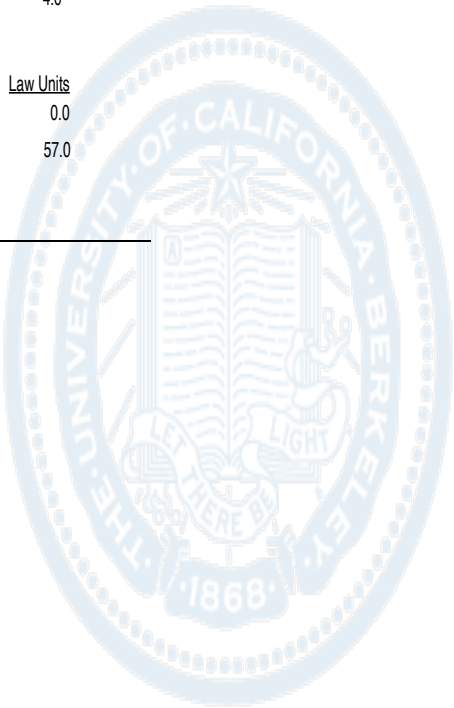
 Carol Rachwald, Registrar

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Admit Term: 2021 Fall

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Page 2 of 2

|   |        | 2023 Fall                     |       |           |
|---|--------|-------------------------------|-------|-----------|
| Course                                      |        | Description                   | Units | Law Units |
| LAW   | 223.1  | Election Law                  | 3.0   | 3.0       |
| Units Count Toward Race and Law Requirement |        |                               |       |           |
| Abhay Aneja                                 |        |                               |       |           |
| LAW   | 227.11 | Emp Arbitr:Law and Practice   | 2.0   | 2.0       |
| Units Count Toward Experiential Requirement |        |                               |       |           |
| Barry Winograd                              |        |                               |       |           |
| LAW   | 241    | Evidence                      | 4.0   | 4.0       |
| Jonah Gelbach                               |        |                               |       |           |
| LAW   | 244.1  | Adv Civ Pro:Complex Civil Lit | 4.0   | 4.0       |
| Andrew Bradt                                |        |                               |       |           |
|   |        |                               | Units | Law Units |
| Term Totals                                 |        |                               | 0.0   | 0.0       |
| Cumulative Totals                           |        |                               | 57.0  | 57.0      |



 Carol Rachwald, Registrar

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**KEY TO GR DES**

1. Grades for Academic Years 1970 to present:

|    |   |   |    |   |             |
|----|---|---|----|---|-------------|
| HH | - | High Honors   | CR | - | Credit      |
| H  | - | Honors  | NP | - | Not Pass    |
| P  | - | Pass  | I  | - | Incomplete  |
| PC | - | Pass Conditional or Substandard Pass (1997-98 to present) | IP | - | In Progress |
| NC | - | No Credit   | NR | - | No Record   |

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: <https://www.law.berkeley.edu/careers/for-employers/grading-policy/>

Transcript questions should be referred to the Registrar.

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May 15, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Re: Jane Balkoski

Dear Judge Robinson:

I highly recommend Jane Balkoski for a judicial clerkship in your chambers.

I had the pleasure of teaching Jane during her first-year legal writing courses at Berkeley Law, and of supervising her this year as one of my two teaching assistants. In both contexts, Jane has been a standout, showing herself to be smart, capable, and collegial. I believe Jane has the talent and traits necessary to be a successful judicial clerk and that she would be a positive addition to your chambers.

While she was my student, Jane showed herself to be a nimble thinker and an efficient researcher. She quickly understood each of the various substantive problems she analyzed in my classes, even as those problems became more complex. She located the key cases for each problem and correctly interpreted those cases to understand their significance. Finally, Jane effectively used the cases she selected. In the spring, she framed the cases in her brief accurately but persuasively to support her client's position in a FOIA case, demonstrating both her creativity as an advocate and her caution never to overstate or misstate the law. I believe that Jane has the research and analytical skills to be an extremely effective judicial clerk.

Jane is also a talented legal writer. The final brief she produced last spring was polished and readable. She was able to express her points clearly and concretely without wasted words, making her argument a pleasure to read. Indeed, Jane's final brief earned the top score (and Best Brief award) in her section. A practicing attorney could have filed Jane's final brief with justifiable pride. This year, Jane continued to hone her writing skills as a judicial extern for California Supreme Court Justice Goodwin Liu. If I were still practicing law, I would feel confident assigning complex writing projects to Jane.

Jane's transcript makes clear that she is a successful student. Her academic success comes as no surprise to me. While she was my student, Jane showed herself to be a smart learner. She came frequently to my office hours with thoughtful questions and seeking critiques of her draft work. She showed herself to be coachable, quickly understanding and implementing my suggestions about how her work could improve. She therefore was able to master the new skills necessary for effective legal analysis and writing before many of her peers.

This year, Jane was a valuable addition to my classes as a teaching assistant. In this role, Jane assisted students during in-class research exercises and other collaborative activities, provided individualized feedback about students' work, conducted office hours, helped students prepare for oral arguments, and judged students during final oral arguments. My students described her as "awesome," "excellent," and "amazing." They praised her for being "super helpful" and for being "very kind and honest." And they praised her "very detailed" feedback on their work. I was similarly impressed. Jane efficiently managed her work (even while juggling other commitments). She worked independently but also kept me informed of student issues she encountered. I feel lucky to have worked with her!

Finally, I have enjoyed coming to know Jane over the last two years. In addition to being smart and skillful, Jane is thoughtful, kind, and funny. She is generous with her time and is viewed as a mentor by more junior law students. I look forward to keeping in touch with Jane after law school and seeing where her career will lead!

I expect Jane will be as successful in her legal career as she has been in her legal studies, and highly recommend her for a clerkship. Please feel free to contact me if you have any questions, or if I can provide any further information.

Sincerely,

Cheryl Dyer Berg  
Professor of Legal Writing  
Legal Research, Analysis, and Writing Program  
University of California, Berkeley School of Law

Cheryl Berg - cberg@berkeley.edu - 510-642-8100

May 19, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I am writing to convey my enthusiastic support for Jane Balkoski's application for a clerkship.

Jane took my course on Consumer Financial Regulation during the Fall 2022 semester. This course provides an interdisciplinary overview of consumer finance. Over the past few decades, households have faced the mounting pressures on their finances due to mortgages, student loans, credit cards, healthcare, long term care, and inadequate retirement income. The course teaches the economic underpinnings of how consumers make financial decisions and traces out existing consumer protection efforts targeting financial products, focusing on particular markets where recent regulations have been passed. Students are required to write a 15-20 page paper on a topic of their choice, culminating with a proposed policy change.

Right from the beginning of class, Jane distinguished herself by participating regularly and pursuing conversations about consumer law and related issues outside of class. She regularly drew on her own background in the service industry and as a paralegal in a plaintiff-side firm to illuminate our discussions with real-life examples. Jane also challenged herself to choose a topic with a difficult set of technical issues to discuss in her final paper – the market for reverse mortgages. She found that reverse mortgage customers needed counseling before they could access their own home equity, which erected a significant barrier for elderly homeowners to finance their retirement. Jane carefully explained reverse mortgages and the key regulations, concluding that counseling requirements would have to be modified in order to be effective.

Jane's work in my class was excellent, and put her in the top half of students across the top 10 law schools I have been affiliated with. She is creative, diligent, and has a knack for identifying the key feature of a complex system, abstracting away from the less important details. Moreover, Jane is excellent at incorporating feedback on her writing. Our class paper required two drafts with individualized feedback, and Jane was able to significantly improve the paper in response to comments.

Jane has also distinguished herself outside of my class. She was given academic honors for being in the top 25% of her class. She is an editor for the Berkeley Journal of Employment and Labor Law and has completed a judicial externship. Jane plans to spend her career working for a state or federal agency. I have no doubt that she will continue to use her skills in research, analysis, and writing to do fantastic work in her clerkship and future career opportunities.

I highly recommend Jane for this position. I am happy to provide further details upon request, either by email or via phone at 518-526-6700.

Best regards,

Manisha Padi

Manisha Padi - Mpadi@berkeley.edu - 5106425406



**Supreme Court of California**

350 McALLISTER STREET  
SAN FRANCISCO, CA 94102-4797

GOODWIN LIU  
ASSOCIATE JUSTICE

(415) 865-7090

May 9, 2023

Dear Judge,

I am pleased to recommend **Jane Balkoski** for a clerkship in your chambers. Jane served as an extern in my chambers during the spring of 2023 and worked on a wide range of legal research and writing assignments. My law clerks and I found her to be an excellent extern, and I urge you to give her careful consideration.

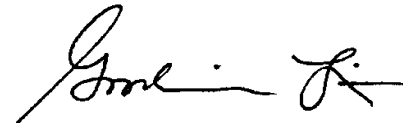
Jane assisted my law clerks with a number of bench memos and weekly analyses of petitions for review, on topics ranging from criminal procedure to voting rights to employment law to tort immunity for government officials. In her assignments, she consistently demonstrated her skills as a strong researcher, analyst, and writer. Here is a sampling of my clerks' reviews of her work: "Jane was excellent and really exceeded my expectations. She was responsive and hardworking and receptive to feedback. Her work product was very good and reliable." "I found her legal research and analysis to be strong; she identified the correct universe of cases and was able to apply the principles from them deftly." "She is a good researcher, a fantastic writer and has a sharp legal mind." "She has a great attitude, is very efficient, and implements feedback well." I agree with these impressions and would add that few externs (I typically have 6-8 per year) get such strong evaluations from my busy and demanding clerks.

Jane's humanities background before law school has served her well, especially when it comes to writing. As an undergraduate at Yale, she won two writing prizes and an honorable mention for a third prize. In light of her impressive writing skills, I am not surprised that she was selected to be a legal research and writing tutor in law school and thrived in that role. At UC Berkeley, Jane has achieved a strong academic record and will serve as Managing Editor of the *Berkeley Journal of Labor & Employment Law*, among other activities. Her leadership role on the journal builds on her prior work on workers' rights issues at the Wage Justice Clinic in Berkeley and the Lieff Cabraser firm, and I expect she

will pursue a career in government or the nonprofit sector with a focus on economic justice issues.

In sum, I am very impressed with Jane and appreciate her valuable contributions to my chambers' work. She is a strong clerkship candidate, and I hope you will invite her for an interview.

Sincerely,

A handwritten signature in black ink, appearing to read "Goodwin Liu", with a stylized flourish at the end.

Goodwin Liu

Jane Balkoski — Writing Sample

*Note:* I was tasked with writing the State’s brief in *Taking Offense v. State of California*, a case currently pending before the California Supreme Court, for an appellate advocacy course. At issue is a bill that criminalizes willful and repeated misgendering in long-term care facilities. The research, analysis, and writing are substantially my own, though my professor provided high-level comments on a draft. Where indicated, portions of this brief have been eliminated for the purpose of brevity. I would be happy to provide the complete brief upon request.

## INTRODUCTION

Isolation, poverty, homelessness, and premature institutionalization plague California’s lesbian, gay, bisexual, transgender and queer (LGBTQ) seniors. Because these seniors have experienced abuse and harassment within long-term care facilities (LTCFs), they avoid the elder programs and services that would provide invaluable medical care. This vulnerable population is progressively becoming more vulnerable. The California Legislature passed Senate Bill No. 219 (SB 219) in order to address these urgent issues. Though state and local laws already proscribed disparate treatment and discrimination in public accommodations on the basis of gender identity and sexual orientation, these laws had not successfully eradicated harassment within LTCFs. Staff continued to withhold from LGBTQ residents the privileges granted to straight and cisgender residents; they discharged LGBTQ residents abruptly, harassed them, and referred to them by the wrong names and pronouns. In short, staff denied them dignity and autonomy.

Under SB 219, LTCF staff cannot engage in certain “discriminatory acts” targeting LGBTQ seniors. In relevant part, the misgendering provision prohibits staff from “willfully and repeatedly” misgendering an LGBTQ resident or failing to use the resident’s preferred name after being clearly informed of a resident’s preference. Before the law could go into effect, however, *Taking Offense*, an association of “at least one California citizen and taxpayer who has paid taxes to the state within the past year,” brought a facial challenge to the misgendering provision in state court,

Jane Balkoski — Writing Sample

alleging that it violated the First Amendment of the United States Constitution and Article I of the California Constitution.

Because the misgendering provision is a constitutional exercise of California’s police powers, the facial challenge must fail. The First Amendment does not prohibit states from regulating discrimination within their borders, especially when the discrimination targets unwilling listeners in their home. Nor does the First Amendment prohibit states from regulating how caretakers treat their elderly patients. Even if the First Amendment did protect an employee’s right to use incorrect pronouns, the provision would survive both intermediate scrutiny and strict scrutiny. As both the trial court and the Court of Appeal noted, the State has a compelling interest in protecting vulnerable LGBTQ seniors. Though the Court of Appeal held otherwise, the misgendering provision is narrowly tailored to further that interest: it applies only in limited circumstances, leaving open many alternative channels of communication. Given these limits, the misgendering provision is neither unconstitutionally overbroad nor void for vagueness.

Until the misgendering provision goes into effect, LGBTQ seniors will remain at high risk for institutionalization and homelessness. They will continue to avoid facilities and services that provide much-needed medical care. Ultimately, affirming the Court of Appeal’s holding would undermine a valid exercise of California’s power to regulate the health care professions. For these reasons, we ask this Court to reverse the Court of Appeal.

#### STATEMENT OF FACTS AND OF THE CASE

[Omitted for brevity]

#### STANDARD OF REVIEW

[Omitted for brevity]

Jane Balkoski — Writing Sample

### ARGUMENT

The right to free speech is not absolute. *Near v. Minnesota*, 283 U.S. 697, 701 (1931). The First Amendment generally protects a person’s right to speak, but its protections do not shield all speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992); *Aguilar v. Avis Rent A Car System*, 21 Cal.4th 121, 134 (1999). Speech that rises to the level of discrimination, for instance, receives no First Amendment protection. *Aguilar*, 21 Cal.4th at 134-35. In addition, the First Amendment does not limit the government’s power to regulate certain professions or protect vulnerable citizens from inadequate care in medical facilities. See *Nat’l Inst. of Family and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (NIFLA); *Shea v. Bd. Of Med. Exam’r*, 81 Cal. App. 3d 564, 577 (1978).

If a statute infringes on constitutionally protected speech, then the statute must survive either intermediate scrutiny or strict scrutiny. Strict scrutiny applies to content-based regulations of speech, which “single out [a] topic or subject matter for differential treatment.” *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015); *City of Austin v. Reagan Nat’l Advertising of Austin*, 142 S. Ct. 1464, 1472 (2022). Conversely, content-neutral regulations, which may involve a “cursory” examination of speech in service of drawing neutral, location-based lines, need only survive intermediate scrutiny. *Hill v. Colorado*, 530 U.S. 703, 722 (2000).

Ultimately, First Amendment protections form a “spectrum.” *Perry Ed. Assn v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983). On the one hand, the government may not prohibit citizens from protesting on public city streets. *United States v. Grace*, 461 U.S. 171 (1983). On the other, First Amendment protections are at a low ebb in the workplace and in the home, where “strong public policies” justify certain regulations. *Aguilar*, 21 Cal.4th at 155 (Werdegar, J., concurring). The “potential for even subtle coercion” allows the state to place greater restrictions on

Jane Balkoski — Writing Sample

unwelcome and discriminatory speech in the workplace. *Id.* at 158 (Werdegar, J., concurring). And under the captive audience doctrine, intermediate scrutiny applies to regulations of unwelcome speech infiltrating the home. “The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.” *Carey v. Brown*, 447 U.S. 455, 471 (1980).

In enacting SB 219, California has regulated speech unprotected by the First Amendment. Not only is misgendering harassment directed at a captive audience, but the use of pronouns is part of the practice of caretaking in LTCFs. The State has simply clarified the scope of existing laws that already prohibit disparate treatment. JA 021. Further, even if the First Amendment did apply to the misgendering provision, it need only survive intermediate scrutiny. Unlike the content-based restriction at issue in *Reed*, the provision is a content-neutral regulation. Because it is narrowly tailored to further California’s compelling interest in protecting vulnerable seniors, it would survive both intermediate scrutiny and strict scrutiny. The provision is neither unconstitutionally overbroad nor void for vagueness.

**I. Because the Misgendering Provision Is Constitutional, the Facial Challenge Must Fail.**

Taking Offense brings a facial challenge to the misgendering provision, but it cannot meet the heavy burden that applies to such a challenge. Facial invalidation is “strong medicine” that courts only employ as a “last resort.” *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998). A court evaluating a facial challenge looks only to “the text of the measure itself, not its application to the particular circumstances of an individual.” *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1084 (1995).

California courts have applied two alternative tests to determine whether a law is unconstitutional on its face. Under the stricter test, the

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party bringing the challenge must establish that the statute “inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions.” *Coffman Specialties, Inc. v. Dept. of Transp.*, 176 Cal. App. 4th 1135, 1145 (2009) (citation omitted). Under the second, more lenient test, the party must show that the provision “conflicts with constitutional principles in the generality or great majority of cases.” *Id.* (citation and internal punctuation omitted). The party “cannot prevail [under either test] by suggesting that in some future hypothetical situation” the application of the statute could lead to constitutional problems. *Id.*

Here, Taking Offense has failed to meet its heavy burden, even under the more lenient test. As described below, Appellant has not shown that the misgendering provision conflicts with constitutional principles in most instances.

## **II. Unimpeded by the First Amendment, California May Regulate Discriminatory Professional Conduct Directed at Vulnerable Citizens.**

The misgendering provision is an unremarkable exercise of California’s police powers. First, it applies only to LTCF staff who are at work. The statute does not regulate visitors, residents, or staff when they are not at work. Second, only an employee who willfully and repeatedly misgenders a resident after being clearly informed of a resident’s preferences violates the statute. Third, staff remain free to discuss gender and sex with residents.

California may proscribe misgendering within these facilities for three reasons. First, the State may regulate speech that produces certain “special harms.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Repeated and willful misgendering causes one such special harm: unequal access to care. Second, California may protect residents from unwelcome speech that infiltrates LTCFs, where seniors are uniquely vulnerable.

Jane Balkoski — Writing Sample

Finally, the State can regulate how caretakers treat residents. Not only is the provision a permissible regulation of the health care professions, but the State has already prohibited disparate treatment within LTCFs. JA 021. SB 219 clarifies that repeated and willful misgendering is impermissible disparate treatment.

**A. Willful and Repeated Misgendering Is Discrimination  
that Receives No Constitutional Protection.**

In enacting SB 219, California has properly targeted “invidious discrimination” that is not entitled to constitutional protection. *Jaycees*, 468 U.S. at 628. States may regulate discrimination if they do not target acts “on the basis of . . . expressive content.” *R.A.V.*, 505 U.S. at 389; *In re M.S.*, 10 Cal. 4th 698, 723 (1995). As this Court recognized in *Aguilar*, speech that rises to the level of discrimination is not constitutionally protected, and speech becomes discrimination if it produces “special harms distinct from [its] communicative impact.” 21 Cal.4th at 134-35; *Jaycees*, 468 U.S. at 628. Courts determining whether acts produce these “special harms” look to the broader social effects of the conduct. *Id.* Here, willful and repeated misgendering within LTCFs engenders unequal access to care.

In *Harris v. Forklift Systems, Inc.*, the Supreme Court held that purely verbal insults and innuendos rose to the level of discrimination and created a hostile work environment in violation of Title VII. 510 U.S. 17, 23 (1993). Plaintiff’s supervisor repeatedly insulted her because of her gender. *Id.* at 19. He said, “You’re a woman, what do you know,” and “We need a man as the rental manager.” *Id.* Without addressing the First Amendment, the Court held that his speech rose to the level of discrimination because of its pernicious and wide-ranging effects on society: “A discriminatorily abusive work environment . . . can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” *Id.* at

Jane Balkoski — Writing Sample

22. The manager’s speech rose the level of discrimination because of these “tangible effects,” distinct from communicative harm. *Id.*

In *Aguilar*, this Court also recognized that the First Amendment did not protect offensive speech that rose to the level of discrimination. 21 Cal.4th at 121. A manager repeatedly “demeaned” his employees by using racial epithets in the workplace. *Id.* The majority explicitly addressed the issue of whether speech alone could constitute discrimination in violation of state and federal laws. *Id.* at 135. Citing to *Harris* and *R.A.V.*, this Court held that the manager’s speech violated both Title VII and the Fair Employment and Housing Act (FEHA) and thereby enjoyed no constitutional protection. *Id.* at 137. The manager’s speech “permeat[ed]” the workplace with “discriminatory intimidation, ridicule and insult.” *Id.*

In substance and effect, SB 219 resembles the discrimination laws analyzed in *Harris* and *Aguilar*. California has not targeted repeated and willful misgendering on the basis of its “expressive content.” *R.A.V.*, 505 U.S. at 389-90. The statute itself indicates that the California Legislature has not targeted expressive speech; instead, it has specified “prohibited discriminatory acts.” JA 022. The stated purpose is simply “to accelerate the process of freeing LGBTQ residents and patients from discrimination,” not to eliminate certain conversation topics from these facilities. *Id.* Crucially, SB 219 does not prohibit conversations about gender and sex in LTCFs.

California has determined that willful and repeated misgendering rises to the level of discrimination because it produces certain “special harms.” *See Jaycees*, 468 U.S. at 628. These “special harms” are distinct from communicative impact—they are harms to the community as a whole. *See id.* Just as the *Harris* Court did not confine itself to a study of the plaintiff’s psychological state but instead recognized that sexist language in the workplace led to broader societal issues—women stagnating

Jane Balkoski — Writing Sample

professionally and dropping out of the workforce—California has looked beyond the psychological effects of misgendering to the “unique evils” that the conduct engenders. *Jaycees*, 468 U.S. at 628; *see Harris*, 510 U.S. at 22. Misgendering in LTCFs has caused LGBTQ seniors to forego care and increased each senior’s chance of institutionalization and poverty. JA 022-023. Repeated and willful misgendering is unprotected discrimination because it triggers these “tangible” societal harms. *See Harris*, 510 U.S. at 22.

### **B. California May Protect Unwilling Listeners Within the Home.**

Vulnerable LGBTQ residents are not required to welcome unwanted speech into the home. Under the captive audience doctrine, the State may protect listeners who cannot avoid an unwelcome message. “Even if the speaker enjoys the right to free speech, he or she has no corollary right to force people to listen.” *Aguilar*, 21 Cal. 4th at 159. *See, e.g. Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). As demonstrated below, while this Court and the Supreme Court have not expressly held that intermediate scrutiny is the appropriate level of review for a regulation that protects a captive audience, in practice the captive audience doctrine appears alongside the application of intermediate scrutiny. LGBTQ residents form a captive audience because they reside in LTCFs, but the doctrine also applies because the residents are unusually vulnerable. Each facility is at once a home and a hospital.

In *Frisby v. Schultz*, the Court upheld an ordinance prohibiting picketing in front of an individual’s residence, recognizing the homeowner’s right to privacy. 487 U.S. 474, 488 (1988). The municipality adopted the provision because protestors had gathered outside of the home of an abortion provider, generating both controversy and complaints. *Id.* at 476. The Court acknowledged that the ordinance proscribed picketing on

Jane Balkoski — Writing Sample

public streets, a traditional public forum, but it held that the state had a heightened interest in protecting the privacy and tranquility of the home. *Id.* at 484. Of particular importance to the *Frisby* Court was the “focused” nature of the picketing. *Id.* at 476. Picketers wanted to “intrude upon the targeted resident, and to do so in an especially offensive way.” *Id.* at 486. In the Court’s view, to strike down the ordinance would be to make the home “something less than a home.” *Id.* (citation omitted).

Similarly, the *Hill* Court applied the captive audience doctrine to a law protecting citizens seeking medical treatment. 530 U.S. at 717. The statute prohibited a person from knowingly getting within eight feet of another person outside a health care facility “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling.” *Id.* at 707. Citing *Frisby*, the Court extended the captive audience doctrine to health care facilities and their immediate surroundings, holding that the state had the power to protect a citizen’s “right to be let alone.” *Id.* at 717. In the Court’s view, unwanted confrontations could trigger “trauma” in the unwilling listeners, many of whom were already under “emotional strain and worry.” *Id.* at 716. The Court held that the ordinance survived intermediate scrutiny. *Id.* at 730.

In her concurring opinion in *Aguilar*, Justice Werdegarr also understood the captive audience doctrine to apply outside the home. 21 Cal.4th at 160. Pointing to numerous cases in which the United States Supreme Court cited “an audience’s captivity as a factor justifying limitations on speech,” she posited that the Avis employees formed a captive audience. *Id.* (citations and internal punctuation omitted). In Justice Werdegarr’s view, the doctrine was not “reserved for situations in which listeners are physically unable to leave.” *Id.* at 161. Instead, it applied because employees were not “reasonably free to walk away.” *Id.* at 160.

Jane Balkoski — Writing Sample

Employees were not required to “sacrifice their employment” to avoid unwelcome speech. *Id.* at 161.

In enacting SB 219, California has regulated unwelcome speech in the home. Because older LGBTQ citizens reside in LTCFs, each facility is a “citadel of the tired, the weary, and the sick.” JA 022; *see Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969). The State must have the same interest in protecting LGBTQ seniors in LTCFs as it has in protecting homeowners within their homes. To hold otherwise would be to treat seniors as second-class citizens, unworthy of the State’s protection. Given that the government in *Frisby* permissibly regulated picketing on public streets, just outside the home, California may regulate conduct occurring within the home. *See Frisby*, 487 U.S. at 474.

The State, in fact, has a heightened interest in protecting these citizens because LTCFs sit at the intersection of the home and the hospital. Seniors in LTCFs are in “vulnerable physical and emotional conditions,” much like the citizens seeking medical care in *Hill*. *See* 530 U.S. at 728-30. Residents discuss new medications and treatment plans with health care professionals. They report symptoms and receive diagnoses. The government in *Hill* wanted to limit “trauma to patients”—California, too, seeks to minimize the trauma that accompanies misgendering and abuse in LTCFs. *Id.* at 716. In addition, by entering these facilities, seniors have sacrificed much of their privacy and agency. Taking Offense acknowledges in its Petition for Writ of Mandate that many residents must “share intimate living space.” JA 012. Indeed, residents cohabituate with strangers, share meals with strangers, and watch television alongside strangers. “The impact of using inappropriate pronouns is even more offensive and hurtful when it occurs in an environment where one cannot choose the persons with whom one associates.” *Taking Offense v. State*, 66 Cal. App. 5th 696, 732 (2021)

Jane Balkoski — Writing Sample

(Robie, J., concurring). Unlike the homeowner in *Frisby*, these seniors do not enjoy complete tranquility and solitude. *See* 487 U.S. at 474.

Instead, the “potential for even subtle coercion” lurks within LTCFs. *See Aguilar*, 21 Cal.4th at 158. Residents are physically dependent on caretakers, just as the *Aguilar* employees were economically dependent on their manager. JA 022; *see Aguilar*, 21 Cal.4th at 158. Should an employee object to demeaning language, the manager may retaliate, by cutting her hours or firing her. Should a resident object to the use of incorrect pronouns, a nurse or counselor may retaliate by providing worse care. As Justice Werdegard noted in her concurrence, the employee is not expected to quit her job to avoid unwelcome speech. By the same logic, an LGBTQ resident need not abandon her home in order to avoid demeaning language.

The Court of Appeal erred in two ways when it held that LTCF staff also formed a captive audience. Slip Op. 18. First, the Court of Appeal failed to recognize that staff can still discuss gender in the workplace. Second, the court did not acknowledge that the provision applies only when staff members are at work. Because they are free to express their views in any number of ways and in any number of places, they do not form a captive audience. Employees are not required to “walk off the job to avoid unwanted speech,” but they may not use demeaning language in the workplace simply because “people need to work. . . .” *Aguilar*, 21 Cal.4th at 161. Unlike LTCF staff, however, residents cannot “repair to escape from the tribulations of their daily pursuits” at the end of the day. *Carey*, 447 U.S. at 471. The facility is their only refuge.

### **C. The State May Proscribe Disparate Treatment by Caretakers Within LTCFs.**

The misgendering provision prohibits LTCF staff from treating LGBTQ residents and straight or cisgender residents differently. States may place an incidental burden on speech that is “part of the practice” of a

Jane Balkoski — Writing Sample

profession. *NIFLA*, 138 S. Ct. at 2373. The state and the federal government already require staff in medical facilities to provide the same care to all patients, regardless of gender identity or sexual orientation. JA 021. In enacting SB 219, California has clarified how caretakers can practice within the state without expanding the scope of existing laws governing health care facilities.

In *NIFLA*, the Court held that the First Amendment did not apply to regulations of professional conduct incidentally burdening speech. 138 S. Ct. at 2373. The law at issue in the case, requiring pregnancy crisis centers to share information about low-cost family planning services, did not meet those requirements. The notice requirement was not “tied” to a procedure. *Id.* Had it been more closely related to a procedure and applied to other facilities providing identical services, then it would have passed muster. *Id.* In striking down the regulation, the Court held that other ordinances, including informed consent requirements in the medical context, permissibly burdened some speech. *Id.*

Applying that same reasoning, the Ninth Circuit upheld a regulation of professional conduct that burdened some speech. *Tingley v. Ferguson*, 47 F.4th 1055, 1091 (9th Cir. 2022). The court concluded that a statute prohibiting mental health professionals from practicing conversion therapy regulated “only treatment.” *Id.* at 1073. In support of this holding, the court pointed to a “long . . . tradition” of regulations governing health care practitioners within state borders. *Id.* at 1080. The court emphasized that a contrary holding would endanger other regulations, including malpractice laws. In the court’s view, regulations were particularly important in the health professions because practitioners could cause “physical and psychological” harm to those under their care. *Id.* at 1081. *See, e.g., Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090 (2017) (finding that repeated misgendering by hospital staff that led to a

Jane Balkoski — Writing Sample

young person’s suicide could violate the Affordable Care Act, the Unruh Civil Rights Act and Section 11135 of the California Government Code). Because of this risk, states have imposed significant regulations on health care practitioners’ speech from “time immemorial.” *Tingley*, 47 F.4th at 1083; *see also Shea*, 81 Cal. App. 3d at 577 (holding that the “First Amendment is not an umbrella” shielding doctors who make unprofessional comments from liability).

Much like the conversion therapy prohibition in *Tingley*, the misgendering provision regulates how LTCF caretakers can practice their profession. *See Tingley*, 47 F.4th at 1073. The treatment at issue in *Tingley* involved words, but the court reasoned that psychotherapy was “more than just talking.” *Id.* at 1082. *Tingley* could not escape regulation simply because he practiced psychotherapy with words. *Id.* Many LTCF employees, including nurses, doctors, therapists, and social workers, also practice through speech: they speak with residents on a regular basis about physical ailments, mental health, and treatment plans. The State already regulates and may continue to regulate those conversations. Under California law, for instance, doctors cannot peddle snake oil or mischaracterize medications. Cal. Health & Safety Code § 110390. In enacting the misgendering provision, the State has simply regulated a few isolated words—pronouns—uttered pursuant to the practice of a caretaking profession.

But more broadly, both California and the federal government have already prohibited disparate treatment within LTCFs. Under the California Government Code, for instance, no person can be denied “full and equal access to services” that receive state funding. Cal. Gov’t Code § 11135. The Affordable Care Act also prohibits health care providers from denying a person benefits on the basis of sex or gender. 42 U.S.C. § 18116. In order to abide by these laws mandating equal treatment, any LTCF staff member,

Jane Balkoski — Writing Sample

including an administrative employee who rarely speaks with residents, must refer to LGBTQ seniors by their preferred pronouns. A staff member who fails to do so but refers to a cisgender resident by the correct pronoun violates state and federal laws.

Though other laws already prohibit disparate treatment in LTCFs, California enacted SB 219 because a specific evil—unequal access to care—persisted despite these laws. As evidenced by the findings preceding SB 219, the California Legislature found that existing laws had not successfully eradicated disparate treatment in LTCFs. JA 022. The State enacted SB 219 in order to “accelerate the process of freeing LGBT [seniors] from discrimination.” *Id.* Not only does *Prescott* show that misgendering in health care facilities violates state and federal laws other than SB 219, but the facts of the case speak to the inadequacy of those laws. 265 F. Supp. 3d at 1096-97. Had the Affordable Care Act successfully deterred misgendering within medical facilities, then hospital staff would have used the young patient’s preferred pronouns. *Id.* California enacted the misgendering provision in order to put a stop to similar conduct in LTCFs.

California has broad authority to regulate professional conduct within medical facilities, unimpeded by the First Amendment. SB 219 shields LGBTQ seniors from unwelcome and harassing speech within LTCFs, where they are unusually vulnerable.

### **III. The Court of Appeal Erred in Concluding that the Provision Was a Content-based Regulation of Speech.**

The Court of Appeal erred in two ways when it concluded that the misgendering provision was a content-based restriction of speech.<sup>1</sup> First,

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<sup>1</sup> Taking Offense also argues that the provision must survive strict scrutiny because it compels speech. The United States Supreme Court has held that

Jane Balkoski — Writing Sample

the court applied the *Reed* test to the provision. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). At issue in *Reed* was an ordinance that differentiated between signs on public streets. *Id.* The misgendering provision involves discrimination at the intersection of the home and the hospital. JA 021. Second, even under the *Reed* test, the misgendering provision is a content-neutral restriction. Though the provision requires a cursory examination of speech, it draws neutral, “location-based” lines. *See Reagan*, 142 S. Ct. at 1471. The government did not adopt the provision because it disagreed with a message, so it need only survive intermediate scrutiny.

#### **A. *Reed* Applies to Regulations in Public Spaces.**

The Court of Appeal erred when it applied the *Reed* test to the misgendering provision. In *Reed*, the Court analyzed an ordinance that prohibited certain signs in the town’s public spaces. *Reed*, 576 U.S. at 159. The ordinance established different rules for 23 categories of signs. *Id.* Ideological signs received the most favorable treatment: the ordinance permitted these signs in all zoning districts at all times. *Id.* at 159-60. Political signs, on the other hand, could only be erected in a few zoning districts at certain times of the year. *Id.* at 160. The Court clarified that an inquiry into content neutrality must start with whether a statute is facially content based, not whether the government adopted the regulation because

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a law compels speech if it turns an individual or his possessions into “an instrument for fostering public adherence to an ideological point of view.” *Wooley v. Maynard*, 340 U.S. 705, 715 (1977). However, unlike a requirement that students recite the Pledge of Allegiance, the provision does not demand that staff use specific words or language. *See West Virginia State Bd. Of Educ. V. Barnette*, 319 U.S. 624 (1943). LTCF staff may tell residents, visitors, and coworkers that they believe sex to be inextricable from gender. JA 153. They may even refrain from using pronouns in the workplace. As the Court of Appeal noted, the misgendering provision does not compel staff “to voice support for a government message.” Slip Op. 13.

Jane Balkoski — Writing Sample

it disagreed with a message. *Id.* at 165-66. The Court then concluded that the sign ordinance was facially content based because it “singl[ed] out specific subject matter for differential treatment.” *Id.* at 164-65, 169. Having determined that the law was a content-based restriction of speech, the Court held that the provision did not survive strict scrutiny. *Id.* at 173.

Not only are LTCFs a far cry from the public streets at issue of *Reed*, but the *Reed* Court left certain First Amendment doctrines untouched, including discriminatory speech and the captive audience doctrine. These doctrines were not relevant to the Court’s analysis of an ordinance limiting signs in a public forum. The Court aimed to protect the marketplace of ideas from “thought control,” but a LTCF is no such marketplace. *See Reed*, 576 U.S. at 167. As the Court of Appeal noted, many courts have found that *Reed* does not extend to “areas of law where alternative tests and different levels of scrutiny had been applied before *Reed* was decided.” Slip Op. 15. For instance, in *United States v. Swisher*, the Ninth Circuit held that *Reed* did not affect traditional First Amendment categories of unprotected speech. 811 F.3d 299, 313 (9th Cir. 2016). In addition, courts throughout the country have continued to apply the captive audience doctrine in the years since *Reed* was decided. *E.g.*, *Oberholzer v. Galapo*, 274 A.3d 738 (Penn. 2022). *Reed* did not disturb the captive audience doctrine or limit California’s power to proscribe professional misconduct in health care facilities.

#### **B. Even Under *Reed*, the Provision Is a Content-neutral Regulation of Speech.**

The misgendering provision is a content-neutral regulation of speech even under the two-step *Reed* test. First, not all regulations that demand a “cursory examination” of speech are facially content based. *Hill*, 530 U.S. at 722. If a regulation requires such an examination only in order to draw “neutral, location-based lines,” then the regulation is facially content

Jane Balkoski — Writing Sample

neutral. *Reagan*, 142 S.Ct. 1464. Second, if the government adopted a facially content-neutral regulation because it disagreed with the message conveyed, then the regulation is a content-based restriction that must survive strict scrutiny. *Reed*, 576 U.S. at 165-66.

**i. The Provision Is Facially Content Neutral Because It Simply Draws Location-based Lines.**

The misgendering provision is a facially content-neutral regulation of speech even under the *Reed* test. As the Court recently clarified in *Reagan*, not all regulations that require a “ cursory examination ” of speech are facially content based. *Hill*, 530 U.S. at 722. If a regulation requires such an examination only in order to draw “ neutral, location-based lines ,” then the regulation remains facially content neutral. *Reagan*, 142 S. Ct. at 1471.

In *Reagan*, the Court held that a local ordinance distinguishing between two types of signs was a content-neutral restriction. *Id.* at 1475. The ordinance closely regulated “ off-premises signs ,” which promoted products and services that were not located on the sign’s premises, but imposed fewer restrictions on “ on-premises signs ,” which promoted products and services sold on the sign’s premises. *Id.* at 1469. The Court conceded that the ordinance required an inquiry into a sign’s content to determine whether it was an off-premise sign or an on-premise one. *Id.* at 1471. However, the Court clarified that even under the *Reed* test, an ordinance requiring an examination of content “ in service of drawing neutral, location-based lines ” was facially content neutral. *Id.* Any other rule would be “ too extreme of an interpretation ” of *Reed*. The ordinance was therefore “ similar ” to a time, place, or manner restriction. *Id.* at 1473.

The misgendering provision also requires an examination of speech “ only in service of drawing neutral, location-based lines .” *See id.* at 1471. Much like both the *Reagan* ordinance and the *Frisby* ordinance,

Jane Balkoski — Writing Sample

enforcement of the misgendering provision requires an inquiry into the employee’s speech. *See id.*; *Frisby*, 487 U.S. at 488. But that examination of speech “matters only to the extent that it informs” *where* exactly the employee may misgender residents. *See Reagan*, 142 S. Ct. at 1473. Neither the *Reagan* ordinance nor the misgendering provision “single[d] out any topic or subject matter for differential treatment.” *See id.* at 1472. Insofar as the provision simply limits where and when LTCF staff may misgender residents, it resembles a time, place, or manner restriction that need only survive intermediate scrutiny.

The Court of Appeal therefore erred in concluding that the provision was facially content based. Slip Op. 19.<sup>2</sup> Under the *Reagan* Court’s formulation of the *Reed* test, a statute that requires an examination of speech is not always a content-based restriction. *Reagan*, 142 S.Ct. at 1473. Because the misgendering provision draws neutral, location-based lines, the misgendering provision is a facially content-neutral restriction.

**ii. California Did Not Enact the Provision due to Disagreement with Gender Essentialism.**

A regulation that is facially content neutral may nevertheless be content based if the State adopted it “because of disagreement with the message [the speech] conveys.” *Reed*, 576 U.S. at 164; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Pronouns, however, convey no message. In *Kluge v. Brownsburg Community School Corporation*, a court held that a teacher’s refusal to use a student’s preferred name during class—unaccompanied by an explanation of the teacher’s ideological position—did not “convey a message.” 432 F. Supp. 3d 823, 839 (S.D. Ind.

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<sup>2</sup> We note that the United States Supreme Court clarified the scope of *Reed* through the *Reagan* opinion in 2022, several months after the Court of Appeal issued its decision. Slip Op. 1.

Jane Balkoski — Writing Sample

2020). *But see Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021) (holding that a school infringed on a teacher’s First Amendment rights when it prohibited both misgendering and conversations about gender essentialism in the classroom). By the same logic, misgendering within LTCFs conveys no message. Misgendering during a “private interaction” in a LTCF does not contribute to the public debate about gender. *See id.* In addition, speakers use names and pronouns simply to refer to other parties—when the “only point” of words is to address someone, then those words have neither content nor expressive value. *See id.* Because pronouns alone do not convey a message, California could not have enacted SB 219 because it disagreed with certain pronouns.

Nor did California enact the law because it disagreed with gender essentialism. The California Legislature passed SB 219 in order to eradicate discrimination and ensure equal access to care. JA 021. The *Hill* Court concluded that the state’s interest in protecting privacy and giving law enforcement clear guidelines justified the anti-counseling ordinance at issue—by the same reasoning, California’s similar interests in protecting its citizens and establishing clear laws must justify the provision “without reference to the content of regulated speech.” *See Hill*, 530 U.S. at 720. The law is therefore a content-neutral restriction.

**IV. The Provision Survives Intermediate Scrutiny Because It Is Narrowly Tailored to Further California’s Interests in Protecting Seniors and Eradicating Discrimination.**

[Omitted for brevity]

**A. California Has a Compelling Interest in Eliminating Discrimination and Safeguarding the Health of its Seniors.**

[Omitted for brevity]

Jane Balkoski — Writing Sample

**B. The Provision Is Not Substantially Broader than Necessary Because It Leaves Open Ample Alternative Channels of Communication.**

[Omitted for brevity]

**V. The Provision Is Sufficiently Tailored to Survive Even Strict Scrutiny.**

[Omitted for brevity]

**VI. Because the Provision Does Not Criminalize a Substantial Amount of Protected Expressive Activity, It Is Not Overbroad.**

[Omitted for brevity]

**VII. The Provision Is Not Vague Because a Person of Reasonable Intelligence Would Understand its Prohibitions.**

[Omitted for brevity]

CONCLUSION

At the end of each work day, the nurses, counselors, and janitors who work in LTCFs go home. At home, they may spend the evening with their closest friends, or conversely, when the doorbell rings, they may choose not to answer it. At home, in “the most private of places,” they are at once safe from the outside world and free to act as they please. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). Because LGBTQ seniors residing in LTCFs deserve that same freedom and safety, the State of California respectfully asks this Court to reverse the Court of Appeal.

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 Date of JD/LLB **May 23, 2021**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Georgetown Law Technology Review**  
**Georgetown Law Journal - Annual Review of Criminal Procedure**  
 Moot Court Experience **No**

**Bar Admission**

Admission(s) **Massachusetts**

### **Prior Judicial Experience**

Judicial Internships/  
Externships      **No**  
Post-graduate Judicial  
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### **Specialized Work Experience**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**Richard W.J. Bernache**

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Tuesday, March 21, 2023

The Honorable Beth Robinson  
United States Court of Appeals for the Second Circuit  
11 Elmwood Ave,  
Burlington, VT 05401

Dear Judge Robinson

I previously interviewed for a 2023 term clerkship in your chambers. I remain interested and am applying to the 2024 term clerkship opening. Currently, I am clerking for the Honorable Judge Steven Tiscione, Magistrate Judge for the U.S. District Court for the Eastern District of New York. My term with Judge Tiscione ends on October 31, 2023 and I am available to start at your convenience for the 2024-2025 term. Vermont holds a very special place in my heart. I lived in Colchester for six years while attending and then working at Saint Michael's College. I then went on to work for Senator Leahy during law school. In many ways, Vermont is my second home and I would be thrilled to return.

In my current role, I am tasked with managing a wide array of civil motions pending before the Court while also assisting the Judge with his extensive criminal calendar. Through this position, I have further sharpened my analytical skills and am able to quickly digest extensive factual records, efficiently mastering the essential facts of each case before me. In keeping pace with the Court's ever growing caseload, I have become accustomed to producing concise and comprehensive analysis while juggling multiple deadlines independently. I am seeking an additional clerkship to continue to grow these skills while producing fair and reasoned decisions for litigants before the court.

Furthermore, my experience as an Asset Management associate at my previous firm combined with my current clerkship, positions me well to succeed in the Second Circuit. In working with investment fund clients, I quickly developed a substantive body of knowledge in Securities Law. Ultimately, in light of my performance, my firm tasked me with serving as the lead associate and client point-of-contact for a 50 million-dollar fund as a first-year attorney. As part of this role, I routinely advised that client and others on the requirements of applicable statutes and regulations including the Investment Company Act of 1940, the Securities Act of 1933, and others. Combining my analytical skills and substantive knowledge, I believe I would add value to your chambers.

Thank you for your time and consideration. I would welcome the opportunity to interview with you and hope to hear from you soon.

Respectfully,  
Richard Bernache

**RICHARD W.J. BERNACHE**7 Forest Drive, Patchogue, NY 11772 • (781) 974-6259 • [rwb57@georgetown.edu](mailto:rwb57@georgetown.edu)**EDUCATION****GEORGETOWN UNIVERSITY LAW CENTER**

Washington, DC

Juris Doctor, *cum laude*

May 2021

GPA 3.75 (Top Ten Percent = 3.78)

Honors: Top Third; Dean's List 2018-2019; Fall 2019; Spring 2021

Journal: *Georgetown Law Technology Review* – Staff Editor: Fall 2019-Spring 2021Publications: *Georgetown Law Journal Annual Review of Criminal Procedure* – Summer Research Assistant: Summer 2019Activities: *Social Spambots*, 4.1 Geo. L. Tech. Rev. 307 (2019)

Senior Writing Fellow 2020-2021

Legal Writing Fellow 2019-2020

Georgetown Law OutLaw (LGBTQ+ Affinity Group)

**SAINT MICHAEL'S COLLEGE**

Colchester, VT

Bachelor of Arts, *magna cum laude*, in Theatre

May 2016

Post-Bacc B.A. in Political Science

May 2018

GPA 3.8

Honors: Phi Beta Kappa

**EXPERIENCE****THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK**

New York

Law Clerk – The Honorable Steven Tiscione, U.S.M.J.

Fall 2022 – Present

- Draft orders and recommendations on dispositive motions before the Court. Review and assess briefings submitted by litigants regarding pending motions.
- Manage an expansive civil and criminal docket spanning Brooklyn, Queens, and Long Island, NY.
- Communicate with litigants as needed by the Court.

**ROPES & GRAY, LLP**

Boston, MA

Associate Attorney – Asset Management Practice Group

Fall 2021 – Fall 2022

- Served as client point-of-contact and lead associate on client matter managing \$50 million investment fund.
- Reviewed investment opportunities for investment fund clients and provided legal and risk guidance. Negotiated revisions to terms of potential investments.
- Drafted formation and operating documents for multi-million-dollar investment fund clients.
- Advised registered fund clients on regulatory issues.
- Assisted in brief research for election law matter before the Massachusetts Supreme Judicial Court.

**GEORGETOWN LAW APPELLATE LITIGATION CLINIC**

Washington, DC

Student Counsel

Fall 2020 – Spring 2021

- Co-authored petition for certiorari in *Connell v. New York*, No. 20-7210, before the Supreme Court of the United States.
- Co-authored opening and reply brief in immigration appeal before the United States Court of Appeals for the Eleventh Circuit.
- Reviewed and edited briefs and mooted counsel for oral arguments before multiple circuit courts.

**OFFICE OF SENATOR PATRICK LEAHY**

Washington, DC

Law Clerk, Committee on the Judiciary

Fall 2019

- Researched and drafted briefing memos to staff and to the Senator on topics such as antitrust oversight, FOIA legislation, judicial nominations, and impeachment.

**SAINT MICHAEL'S COLLEGE**

Colchester, VT

Assistant Director of Student Activities

Fall 2016 – Summer 2018

- Coordinated, planned, and executed pre-orientation and orientation programs for entering classes of 500 students. Advised student leaders on all student-led programming on campus.



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GUID: 804759475

Course Level: Juris Doctor

**Degrees Awarded:**

Juris Doctor Jun 09, 2021  
Georgetown University Law Center  
Major: Law  
Honors: Cum Laude

**Entering Program:**

Georgetown University Law Center  
Juris Doctor  
Major: Law

| Subj               | Crs | Sec | Title   | Crd   | Grd   | Pts    | R    |
|--------------------|-----|-----|---|-------|-------|--------|------|
| Fall 2018          |     |     |   |       |       |        |      |
| LAWJ               | 001 | 93  | Legal Process and Society   | 2.50  | IP    | 0.00   |      |
| LAWJ               | 002 | 93  | Bargain, Exchange & Liability   | 3.00  | IP    | 0.00   |      |
| LAWJ               | 005 | 30  | Legal Practice: Writing and Analysis                                    | 2.00  | IP    | 0.00   |      |
| LAWJ               | 007 | 31  | Property in Time  | 4.00  | A-    | 14.68  |      |
| LAWJ               | 009 | 33  | Legal Justice Seminar   | 3.00  | B+    | 9.99   |      |
| EHrs QHrs QPts GPA |     |     |   |       |       |        |      |
| Current            |     |     |   | 7.00  | 7.00  | 24.67  | 3.52 |
| Cumulative         |     |     |   | 7.00  | 7.00  | 24.67  | 3.52 |
| Spring 2019        |     |     |   |       |       |        |      |
| LAWJ               | 001 | 93  | Legal Process and Society   | 5.00  | A     | 20.00  |      |
| LAWJ               | 002 | 93  | Bargain, Exchange and Liability Part II: Risks and Wrongs               | 6.00  | A-    | 22.02  |      |
| LAWJ               | 003 | 93  | Democracy and Coercion  | 4.00  | B     | 12.00  |      |
| LAWJ               | 005 | 30  | Legal Practice: Writing and Analysis                                    | 4.00  | A     | 16.00  |      |
| LAWJ               | 008 | 93  | Government Processes  | 4.00  | A-    | 14.68  |      |
| LAWJ               | 611 | 20  | Advocacy, Client Counseling and Negotiation Skills in Practice Settings | 1.00  | P     | 0.00   |      |
| EHrs QHrs QPts GPA |     |     |   |       |       |        |      |
| Current            |     |     |   | 24.00 | 23.00 | 84.70  | 3.68 |
| Annual             |     |     |   | 31.00 | 30.00 | 109.37 | 3.65 |
| Cumulative         |     |     |   | 31.00 | 30.00 | 109.37 | 3.65 |

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| Subj               | Crs  | Sec | Title  | Crd   | Grd   | Pts    | R    |
|--------------------|------|-----|--|-------|-------|--------|------|
| Fall 2019          |      |     |  |       |       |        |      |
| LAWJ               | 038  | 07  | Antitrust Law  | 3.00  | B+    | 9.99   |      |
| LAWJ               | 121  | 07  | Corporations   | 4.00  | A     | 16.00  |      |
| LAWJ               | 1491 | 08  | Externship I Seminar (J.D. Externship Program)             |       | NG    |        |      |
| LAWJ               | 1491 | 100 | ~Fieldwork 3cr   | 3.00  | P     | 0.00   |      |
| LAWJ               | 1491 | 98  | ~Seminar   | 1.00  | A-    | 3.67   |      |
| LAWJ               | 536  | 22  | Legal Writing Seminar: Theory and Practice for Law Fellows | 2.00  | A     | 8.00   |      |
| EHrs QHrs QPts GPA |      |     |  |       |       |        |      |
| Current            |      |     |  | 13.00 | 10.00 | 37.66  | 3.77 |
| Cumulative         |      |     |  | 44.00 | 40.00 | 147.03 | 3.68 |
| Spring 2020        |      |     |  |       |       |        |      |
| LAWJ               | 1182 | 05  | Election Law   | 4.00  | P     | 0.00   |      |
| LAWJ               | 165  | 05  | Evidence   | 4.00  | P     | 0.00   |      |
| LAWJ               | 215  | 05  | Constitutional Law II: Individual Rights and Liberties     | 4.00  | P     | 0.00   |      |
| LAWJ               | 536  | 22  | Legal Writing Seminar: Theory and Practice for Law Fellows | 3.00  | P     | 0.00   |      |
| EHrs QHrs QPts GPA |      |     |  |       |       |        |      |
| Current            |      |     |  | 15.00 | 0.00  | 0.00   | 0.00 |
| Annual             |      |     |  | 28.00 | 10.00 | 37.66  | 3.77 |
| Cumulative         |      |     |  | 59.00 | 40.00 | 147.03 | 3.68 |
| Fall 2020          |      |     |  |       |       |        |      |
| LAWJ               | 178  | 05  | Federal Courts and the Federal System                      | 3.00  | A-    | 11.01  |      |
| LAWJ               | 361  | 03  | Professional Responsibility                                | 2.00  | A-    | 7.34   |      |
| LAWJ               | 504  | 06  | Appellate Litigation Clinic                                |       | NG    |        |      |
| LAWJ               | 504  | 82  | ~Lgl Res, Analysis & Writing                               | 2.00  | IP    | 0.00   |      |
| LAWJ               | 504  | 83  | ~Professional Initiative                                   | 1.00  | IP    | 0.00   |      |
| LAWJ               | 504  | 84  | ~Oral Advocacy   | 1.00  | IP    | 0.00   |      |
| LAWJ               | 537  | 06  | Applied Legal Composition                                  | 1.00  | IP    | 0.00   |      |

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**Record of:** Richard W. Bernache  
**GUID:** 804759475

|  | EHrs       | QHrs       | QPts                                      | GPA        |            |            |          |  |
|--|------------|------------|---|------------|------------|------------|----------|--|
| Current                                | 5.00       | 5.00       | 18.35                                     | 3.67       |            |            |          |  |
| Cumulative                             | 64.00      | 45.00      | 165.38                                    | 3.68       |            |            |          |  |
| <b>Subj</b>                            | <b>Crs</b> | <b>Sec</b> | <b>Title</b>                              | <b>Crd</b> | <b>Grd</b> | <b>Pts</b> | <b>R</b> |  |
| ----- Spring 2021 -----                |            |            |   |            |            |            |          |  |
| LAWJ                                   | 1468       | 08         | Business and Financial Basics for Lawyers | 2.00       | P          | 0.00       |          |  |
|  |            |            | Brian Sawers                              |            |            |            |          |  |
| LAWJ                                   | 1717       | 05         | Congressional Procedure                   | 3.00       | A-         | 11.01      |          |  |
|  |            |            | Victoria Nourse                           |            |            |            |          |  |
| LAWJ                                   | 1738       | 05         | Supreme Court Today                       | 2.00       | A          | 8.00       |          |  |
|  |            |            | Michael Dreeben                           |            |            |            |          |  |
| LAWJ                                   | 317        | 05         | Negotiations Seminar                      | 3.00       | A          | 12.00      |          |  |
|  |            |            | Kondi Kleinman                            |            |            |            |          |  |
| LAWJ                                   | 504        | 06         | Appellate Litigation Clinic               |            | NG         |            |          |  |
|  |            |            | Erica Hashimoto                           |            |            |            |          |  |
| LAWJ                                   | 504        | 82         | ~Legal Research, Analysis & Wr            | 4.00       | A          | 16.00      |          |  |
|  |            |            | Erica Hashimoto                           |            |            |            |          |  |
| LAWJ                                   | 504        | 83         | ~Professional Initiative                  | 3.00       | A          | 12.00      |          |  |
|  |            |            | Erica Hashimoto                           |            |            |            |          |  |
| LAWJ                                   | 504        | 84         | ~Oral Advocacy                            | 2.00       | A-         | 7.34       |          |  |
|  |            |            | Erica Hashimoto                           |            |            |            |          |  |
| LAWJ                                   | 537        | 06         | Applied Legal Composition                 | 2.00       | A          | 8.00       |          |  |
|  |            |            | Michael Cedrone                           |            |            |            |          |  |
| Dean's List Spring 2021                |            |            |   |            |            |            |          |  |
| ----- Transcript Totals -----          |            |            |   |            |            |            |          |  |
|  | EHrs       | QHrs       | QPts                                      | GPA        |            |            |          |  |
| Current                                | 21.00      | 19.00      | 74.35                                     | 3.91       |            |            |          |  |
| Annual                                 | 26.00      | 24.00      | 92.70                                     | 3.86       |            |            |          |  |
| Cumulative                             | 85.00      | 64.00      | 239.73                                    | 3.75       |            |            |          |  |
| ----- End of Juris Doctor Record ----- |            |            |   |            |            |            |          |  |

Georgetown Law  
600 New Jersey Avenue, NW  
Washington, DC 20001

May 19, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I write to highly recommend Richard Bernache for a judicial clerkship in your chambers. As a student advocate when he took my clinic during his third year of law school, Richie's attention to detail, drive to think through all sides of an issue, and generosity as a team member quickly earned my trust. He channeled a deeply rooted passion for storytelling into comprehensive and persuasive brief-writing on behalf of two clients. In the years since he graduated from law school, Richard has gained even more skills, particularly during his time with Magistrate Judge Steven Tiscione. I am confident that Richard's abilities as a researcher and writer, as well as his dedication to being a supportive colleague, would make him a valuable contributor to your chambers.

I had the pleasure of teaching Richard in my Appellate Litigation Clinic during the 2020–2021 academic year. A two-semester clinic for third-year law students, the clinic accepts appointments to cases in the United States Courts of Appeals for the D.C., Fourth, and Eleventh Circuits. Paired in teams, students participate in all aspects of appellate litigation, including litigation strategy, case research, brief drafting, and oral argument. Alongside the casework, students participate in a weekly seminar to develop their advocacy skills. Because my fellows and I closely supervise students throughout their work, we learn a lot about their work habits and the quality of the work they are capable of producing.

During his time in the clinic, Richard worked on drafting an opening and reply brief in the Eleventh Circuit and a petition for certiorari. He excelled on all. First, Richard and a student partner drafted opening and reply briefs in an Eleventh Circuit immigration petition for review. The case presented challenging issues: Some were fact-intensive, and others arose out of a novel statutory interpretation from the Attorney General. This case also demanded that the students understand how each issue fit into the broader set of statutory schemes that govern immigration relief.

The case had a relatively extensive administrative record. Although law students often struggle to master such records, Richard did not. From the day he was assigned to this case, he carefully examined the record, identified every relevant fact, and quickly grasped the issues those facts presented. He also was unafraid to note, and grapple with, potentially unfavorable facts, regularly anticipating potential counterarguments and sharing ideas on how to respond to them. Each idea reflected his comfort with the record and his drive to develop a compelling written argument on behalf of his client.

Richard continued to display this diligent and thoughtful approach to each stage of the research and writing process. Right away, he recognized the heart of the issues he had been assigned and developed methodical and compelling analyses of each. An example illustrates the point. For one issue, he vividly described persecution our client had experienced. And he presented details about its timing and quotations from the record in a way that demonstrated the similarity of our client's case to recent, favorable precedent. But he did not stop with that favorable precedent or limit himself to one view of it. Instead, he searched to understand the ways a court might view our case as meaningfully distinct and how we could respond to those distinctions. His comprehensive approach to research, combined with his work ethic, drove him to make each iteration of his opening brief drafts stronger. Richard's writing from the opening brief through the reply told a powerful story that he persuasively connected to the governing law. And that attention to research led him to accurately predict and prepare for each move the opposition brief eventually made. Most law school students do not think about counterarguments as they are drafting briefs. Richard's ability to do this speaks both to his attention to narrative and to his attention to detail.

As he was responding to edits to his writing, Richard also demonstrated maturity and judgment rare among law students. He effortlessly balanced an ability to work independently with an enthusiasm for incorporating others' ideas. Clinic students receive extensive feedback from supervising attorneys, other clinic participants, and outside readers. Richard showed a comfort with addressing this feedback and needed little guidance when doing so, even when presented with potentially conflicting thoughts and recommendations. He also regularly explained decisions he made—and new ideas the feedback inspired—in ways that facilitated bigger-picture brainstorming and team discussions. If a suggestion prompted a question or risked creating a tension with a team strategy, he would not hesitate to bring the issue to the group. But he also proposed solutions. In turn, he helped to build consensus and left the whole team confident that, if he were asking a question or identifying a potential problem, he would come prepared with his own well-developed thoughts and a desire to find the best path forward as a team.

At the same time Richard was working diligently on his own assignments, he maintained a sense of responsibility for the case as a whole. For instance, we had initially provided the students optional background material about the operation of immigration law and procedure. Weeks later, when he and his teammate were editing their opening brief, he noticed that a section of the brief his teammate had drafted described a procedural matter imprecisely. Although he was not responsible for that section of

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the brief, he identified the imprecision and suggested a way to fix it. He did so respectfully and carefully, showing his conscientiousness as a teammate and his concern for every aspect of the team's final product.

After filing the opening and reply briefs in the Eleventh Circuit, Richard had completed the clinic's writing requirements. But over winter break, a fellow student's family emergency required us to quickly re-staff a petition for certiorari we were preparing on a Fourth Amendment issue on behalf of a client who had been convicted in the New York state court system. Richard stepped up immediately, volunteering to devote a large portion of his winter and spring to this substantial and unexpected new project. He did so cheerfully and with the utmost professionalism, bringing his considerable skill and creativity to bear on the petition. Although many students initially struggle to grasp the unique nature of a cert petition—and how its distinct goals inform the type of arguments it must contain—Richard experienced no such growing pains. From his first draft, he focused on the importance of the Fourth Amendment issue rather than simply regurgitating the merits arguments that had been presented below. And through the revision process, he continued to develop this theme with vivid, concrete examples drawn from the headlines and from the Court's own writings. As a result of Richard's flair for storytelling, the finished product had a gripping tangibility that is unusual in student work. Meanwhile, Richard collaborated beautifully. He came to every team meeting ready to share his considered views on strategy. While students often try to predict what the supervising attorney "wants" and will develop their views accordingly, Richard's unprompted insights into the case demonstrated his ownership of the material and his capacity for independent analysis. But despite Richard's clear talents, he never gave off any hint of arrogance or territoriality. To the contrary, he was quick to highlight the contributions of his teammate and to meaningfully develop his written product in response to feedback from both supervisors and peers.

Finally, Richard's approach to advocacy in our clinic has reflected the experiences and motivations that brought him to law school. Before law school, his work in theater led him to recognize a passion for helping individuals share their stories in ways that allowed viewers and readers to understand those stories. That passion shone through in his work on behalf of clients in our clinic. His attention to detail, thoughtful approach to research and writing, and ease in collaborating with others helped him develop a compelling set of briefs throughout this year. I am confident that Richard has only enhanced those skills in the years since he has graduated from law school, and I am confident that he would serve your chambers well as a judicial law clerk. Please feel free to contact me if you need any additional information.

Best regards,

Erica J. Hashimoto  
Professor of Law and Program Director

Erica Hashimoto - eh502@georgetown.edu

STEVEN TISCIONE  
*United States Magistrate Judge*

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK  
100 FEDERAL PLAZA  
CENTRAL ISLIP, NEW YORK 11722

225 CADMAN PLAZA EAST  
BROOKLYN, NEW YORK 11201

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Dear Judge,

I write to enthusiastically recommend Richard (Richie) Bernache for a clerkship in your chambers. Richie began his current clerkship in my chambers in October of 2022 and from the start has demonstrated his ability, organization, and adaptability in managing a busy docket at the Eastern District. I am confident he would make a welcome addition to your chambers.

The Eastern District manages a large and diverse caseload and Richie has consistently shown an ability to approach a new area of law with confidence, addressing each new issue presented to the Court with thoughtfulness and a commitment to neutrally deciding the matter before him. In each of his drafts, Richie is able to carefully untangle litigants' arguments and marshal often extensive records into a clear and orderly opinion that marches the reader through each step of its analysis. When presented with a thorny or unclear issue, Richie always proposes a solution rooted in principles of law and judicial analysis. In one such instance, Richie approached me with an open question of standing law in this Court. Rather than simply ask for my opinion, he presented what he believed to be the appropriate outcome, supporting his position with persuasive precedent. That outcome was ultimately incorporated into his final Report and Recommendation which was subsequently adopted by the District Court.

Richie has managed to balance this thoughtful and thorough approach to his drafting with the demanding time pressures on the Court. My clerks are expected to largely work independently, handling their caseloads and deadlines while also assisting me in managing my criminal docket. Richie has proven his time management skills by onboarding his co-clerk during a busy two-week period of arraignment duty, in which my chambers must be available for all new criminal matters coming before the Central Islip courthouse. At the same time, Richie continued to work through his regular caseload in light of approaching deadlines.

Lastly, even during the busiest periods in my chambers, Richie has shown a willingness to take on new challenges while always maintaining a positive attitude. He is a team player, unafraid to assist wherever needed and always willing to think through a complex problem with his co-clerk. He would be a valuable addition to your chambers, and I recommend him without reservation. Should you have any further questions, please feel free to contact my chambers.

Sincerely,

Steven L. Tiscione  
United States Magistrate Judge  
Eastern District of New York

**RICHARD W.J. BERNACHE**

7 Forest Drive, Patchogue, NY 11772 • (781) 974-6259 • [rwb57@georgetown.edu](mailto:rwb57@georgetown.edu)

**Re: Writing Sample**

Dear Judge

The attached writing sample is a Report and Recommendation drafted in my current position as a law clerk for the Honorable Steven Tiscione, United States Magistrate Judge for the U.S. District Court for the Eastern District of New York. The Report and Recommendation partially grants and partially denies a motion for summary judgment brought before this Court in a Title VII discrimination matter. The record in the case was extensive, dating back multiple years.

This version of the Report and Recommendation has not been edited by anyone other than me. The names of the parties have been redacted for anonymity and this Report will use "Plaintiff" and "Defendant" for clarity.

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

-----X

[REDACTED],

Plaintiff,

**REPORT AND RECOMMENDATION**

v.

19-cv-184 (DG) (ST)

[REDACTED]

Defendants.

-----X

**TISCIONE, United States Magistrate Judge:**

Before this Court is a motion for summary judgment by Defendant pursuant to Federal Rule of Civil Procedure 56. Plaintiff was employed as a corrections officer at the Metropolitan Detention Center (the “MDC”) in Brooklyn, NY during 2007-2008 and again from 2014-2016. Plaintiff claims his former supervisor, Lieutenant [REDACTED] (“Lt. M”), conduct amounted to retaliation for refusing her sexual advances and created a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”). Defendant denies any violations. The Honorable Diane Gujarati referred the motion to me for a Report and Recommendation. For the reasons below, I recommend Defendants’ motion be GRANTED in part and DENIED in part.

**BACKGROUND<sup>1</sup>**

[REDACTED] (the “Plaintiff”) first began working at the MDC on March 4, 2007, as a correctional officer where he was employed until December 6, 2008. E.D.N.Y. L.R. 56.1

<sup>1</sup> On a motion for summary judgement, I am required to draw all inferences and resolve all factual ambiguities on behalf of the nonmoving party, in this case the Plaintiff. *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012). As such, for the purposes of this statement on the factual background of this case, I accept Plaintiff’s version of events as true.

Statement ¶¶ 1, 9, ECF No. 63. During that period, one of Plaintiff's colleagues, ██████ M, sought a sexual and romantic relationship with Plaintiff. *Id* at ¶ 3. Plaintiff refused M's advances, prompting her to use slurs in reference to the Plaintiff and question his manhood. *Id*; Pl. Opp'n Br. 2, ECF No. 59. Plaintiff did not, however, report this conduct to MDC officials or contact the Equal Employment Office ("EEO"). E.D.N.Y. L.R. 56.1 Statement ¶¶ 4, 5, ECF No. 63. Plaintiff then went on to work for the Pentagon Police, returning to the MDC on August 26, 2014. *Id* at ¶¶ 7, 9, 15.

Plaintiff returned to the MDC as a Senior Corrections Officer and M had been promoted to Lieutenant, making her one of Plaintiff's superiors, supervising him "on and off" each quarter. *Id* at ¶¶ 15, 30-31. While Plaintiff testified that he did not believe the environment at MDC had changed and that he was happy to return, this was partly because he was better able to care for his ailing mother by returning to New York. *Id* at ¶¶ 16, 17; Pl. Opp'n Br. 3, ECF No. 59. Lt. M continued her advances towards Plaintiff and at one point entered the room where Plaintiff was stationed, sat on the desk, spread her legs, and made a direct and explicit offer for sex to Plaintiff. Pl. Opp'n Br. 4, ECF No. 59. When Plaintiff denied her advances, Lt. M again used sex-based and sexual orientation-based slurs against Plaintiff. *Id*. Additionally, Lt. M confiscated personal items belonging to Plaintiff, claiming they were contraband. *Id*. The confiscation led to an MDC investigation that concluded without discipline to either party. *Id*; E.D.N.Y. L.R. 56.1 Statement ¶¶ 35, 37, ECF No. 63.

Following this interaction Plaintiff continued to perceive Lt. M's actions as retaliation for refusing her advances. Plaintiff believed Lt. M unfairly scrutinized his work in an instance with orderlies and again while on dry duty, interfered with his attempts to contact union

representation, and called him on his personal cell phone to state “don’t think I forgot the past and how you played me . . . . I don’t take no for an answer.” Pl. Opp’n Br., 4-5, 8-9.

Central to Plaintiff’s complaint is Lt. M’s alleged interference with Plaintiff’s Basic Prisoner Transport (“BPT”) duties. BPT requires officers to leave the MDC in order to transport inmates to hospitals and nursing homes. E.D.N.Y. L.R. 56.1 Statement ¶ 19, ECF No. 63. Due to the hours required to transport inmates, attend the appointments, and transport back, officers performing BPT duties are often afforded additional overtime. *Id* at ¶ 20, ECF No. 63. Plaintiff was not assigned to a permanent BPT post and did not bid on such a post during the quarterly bidding process. *Id* at ¶¶ 24-25. However, Plaintiff was nonetheless assigned BPT duties regularly, and in one relevant period was assigned to BPT 63% of the time. *Id* at ¶¶ 26-27. Plaintiff claims that Lt. M, and other staff friendly with Lt. M, would refuse to assign Plaintiff to BPT, reassign his BPT duties to other officers, or call Plaintiff back from BPT early. *Id* at ¶ 20, ECF No. 63; Pl. Opp’n Br. 5, ECF No. 59.

Plaintiff documented what he believed to be retaliatory conduct in a series of emails and memorandum to his supervisors. In total, plaintiff authored over ten such correspondences between 2014 and 2016. Def. Br Exhibits D-O, ECF Nos. 58-4-58-15. Of these, only one dated March 25, 2016, explicitly complained of Lt. M’s sexual advances. E.D.N.Y. L.R. 56.1 Statement ¶¶ 53-54, ECF No. 63. Plaintiff maintains that MDC officials were copied on this letter on March 25, but Defendant claims its staff were not aware of Plaintiff’s claims of sexual harassment until May 23, 2016. *Id* at ¶¶ 56, 64; Pl. Opp’n Br. 7-8, ECF No. 59. The complaint was then referred to the Department of Justice Office of Internal Affairs (the “DOJ”) on May 25, 2016, which was subsequently deferred back to MDC in September of 2016. E.D.N.Y. L.R. 56.1 Statement ¶¶ 64-65, ECF No. 63. An MDC official conducted an initial interview with Plaintiff,

but Plaintiff later refused to schedule an additional interview and the investigation was closed. *Id* at ¶¶ 66-69. Plaintiff left the MDC for a new position on November 26, 2016. *Id* at ¶ 63.

While the MDC investigation was pending, Plaintiff contacted an EEO counselor on September 26, 2016. *Id* at ¶ 70. Plaintiff filed an administrative complaint on December 29, 2016. *Id* at ¶ 71. The complaint and subsequent appeal were denied on April 2 and August 29, 2016, respectively. *Id* at ¶ 72-73; Def. Br. Exhibit C, ECF No. 58-3. Plaintiff then brought this case in the Eastern District of New York on January 9, 2019. *See* Pl. Am. Compl., ECF No. 22. Defendant moved for summary judgment on March 4, 2022. Def. Motion for Summary Judgment, ECF No. 55. Judge Gujarati then referred that motion to me for a Report and Recommendation.

## LEGAL STANDARD

### I. Summary Judgment Standard

Summary judgment is appropriate when the movant “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). An issue of fact is material if the fact “might affect the outcome of the suit under the governing law...” *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists as to a material fact when “evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id*.

On motions for summary judgment, the moving party bears the initial burden of establishing the absence of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party meets that burden, the non-moving party must then show there is a genuine dispute for trial. *Id*. The burdens on both parties as to the underlying elements are aligned as they would be at trial. *Id*. at 254.

When considering a motion for summary judgment, the Court must construe “all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought.” *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (quoting *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003)).

## II. Title VII Standards

This Court applies the burden-shifting analysis established in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973) to discrete act claims brought under Title VII. *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426, 443 (2d Cir. 1999) (*abrogated on other grounds by Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). Under this analysis:

“the plaintiff must first demonstrate a *prima facie* case of retaliation, after which the defendant has the burden of pointing to evidence that there was a legitimate, nonretaliatory reason for the complained of action. If the defendant meets its burden, the plaintiff must demonstrate that there is sufficient potential proof for a reasonable jury to find the proffered legitimate reason merely a pretext for impermissible retaliation.” *Id.*

Claims of hostile work environments are subject to a different standard. To succeed on such claims, a plaintiff must show that the “the harassment was ‘sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.’” *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (quoting *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir.2002)).

## DISCUSSION

Plaintiff’s complaint alleges a campaign of sexual harassment against him, predominantly by one of his supervisors, Lt. M. The alleged conduct began when Plaintiff declined Lt. M’s offers to enter into a romantic relationship with her during his first tour of duty with the MDC in 2007 and 2008. E.D.N.Y. L.R. 56.1 Statement ¶ 3, ECF No. 63; Pl. Opp’n Br. 2, ECF No. 59.

Plaintiff was employed at MDC in two periods, from 2007-2008 and 2014-2016. E.D.N.Y. L.R. 56.1 Statement ¶¶ 1, 9, 15, 63 ECF No. 63. Plaintiff's complaint alleges that this harassment violated Title VII of the Civil Rights Act of 1964 both as a series of discreet acts of retaliation for his refusal to enter a relationship with Lt. M as well as a hostile work environment based on sex. Pl. Am. Compl. ¶ 40; ECF No. 22. I examine each claim in turn.

# **I. Plaintiff's Discreet Act Claims.**

## **a. Plaintiff's Time-Barred Claims.**

Defendant argues that nearly all of Plaintiff's discreet act claims are time-barred. Under 29 C.F.R. § 1614.105(a)(1), an aggrieved federal employee who believes "they have been discriminated against on the basis of ... disability ... must consult a[n] [EEO] Counselor prior to filing a complaint...within 45 days of the effective date of the action." Plaintiff first contacted and EEO counselor regarding the alleged harassment on September 26, 2016. E.D.N.Y. L.R. 56.1 Statement ¶ 70, ECF No. 63. Applying the 45-day bar, only events occurring on or after August 12, 2016 may be considered in deciding Plaintiff's discreet act claims.

While Plaintiff concedes that this date is the correct cut-off date, Plaintiff nonetheless asserts that his claims are timely because "from early 2015 until [Plaintiff] left the MDC in November 2016, M would regularly, on at least a weekly basis, either deny him [BPT], or when on BPT, have him relieved." Pl. Opp'n Br. 12, ECF No. 59. In support of this, Plaintiff filed an affidavit with his opposition memo to this motion for summary judgment attesting to the frequency with which M denied or reassigned Plaintiff's BPT duty. Pl. Opp'n Aff., ECF No. 61. However, "[a] party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Golden v. Merrill Lynch Co., Inc.*, No. 06 Civ. 2970 (RWS), 2007 WL

4299443, at \*9 (S.D.N.Y. Dec. 6, 2007) (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 63 (2d Cir.1997)). This remains the case even when “the purported new evidence would otherwise create a triable issue of fact.” *Id* (citing *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir.2001)).

It is uncontested that Lt. M supervised Plaintiff “a few times, ‘on and off,’ throughout each quarter.” E.D.N.Y. L.R. 56.1 Statement ¶ 31, ECF No. 63. Supervisor and employee pairings at the MDC rotate often and when asked in his deposition to give a range for how often per quarter Lt. M acted as Plaintiff’s supervisor, Plaintiff answered “I can’t give a range . . . . It’s intermittent, on and off.” ██████████ Dep., 75, ECF No. 61-1. Furthermore, when asked about how frequently he interacted with Lt. M, apart from how often he was directly supervised by her, Plaintiff responded, “I can’t recall how many times a month . . . .” *Id* at 112. Therefore, evidence in the record prior to Plaintiff’s recent affidavit showed, without contest, that Plaintiff was only supervised by Lt. M on an intermittent basis.

In addition, the record shows that Lt. M only had authority to remove or re-assign Plaintiff’s BPT duty when she was directly supervising him, as evidenced by Plaintiff’s statements that when he “worked with other Lieutenants . . . everyone knew that I was BPT, so they would automatically put me BPT.” *Id* at 173. Plaintiff also stated “[a]s long as the Lieutenants were around, I was safe.” *Id* at 175. During this line of questioning Plaintiff reiterated that he could not “recall the exact number” of times Lt. M removed him from BPT duty. *Id* at 171-72. If Lt. M only supervised Plaintiff on and off a few times per quarter, and only had authority to reassign his BPT duties when supervising him, then the record prior to Plaintiff’s submission of this most recent affidavit contradicts Plaintiff’s current assertion that he was denied or reassigned BPT at least once a week. Due to this contradiction, I cannot consider

the factual allegations regarding the frequency of Lt. M's conduct contained in Plaintiff's affidavit.

Without this statement of frequency from Plaintiff's affidavit, there is nothing in the record to demonstrate that Plaintiff was denied, re-assigned, or removed from BPT during the relevant time period. Of Plaintiff's memoranda and emails that mention his issues securing BPT assignments, only one falls within the 45-day period. E.D.N.Y. L.R. 56.1 Statement ¶ 51, ECF No. 63. However, as discussed in detail below in Section I.b., that memo does not allege any specific incident in which he was denied BPT during the time-period and is otherwise insufficient to sustain a finding of retaliation under Title VII. *Id.* at ¶60.

**b. Plaintiff's Remaining Discreet Act Claims.**

Eliminating Plaintiff's factual allegations occurring before August 12, 2016 leaves the following:

- (1) On August 13, 2016, Plaintiff emailed an Associate Warden to allege bullying by a supervisor other than M. *Id.* at ¶ 51.
- (2) On September 26, 2016, Plaintiff first contacted an EEO counselor concerning his alleged sexual harassment and retaliation. *Id.* at ¶ 70.
- (3) On September 28, 2016 Plaintiff contacted a number of MDC officials to inquire why he was not being "utilized for BPT Hospital duties" and inquiring whether he was under investigation for any personal or professional conduct. *Id.* at ¶ 58.
- (4) In September of 2016, Plaintiff's complaint, which had previously been referred to the DOJ, was referred back to the MDC. *Id.* at ¶ 65.
- (5) One November 8, 2016, a Special Investigative Agent interviewed Plaintiff regarding his claims. *Id.* at ¶ 66.

(6) On November 26, 2016, Plaintiff completed his last day of employment with the MDC, departing for a position with the Department of Veteran's Affairs. *Id* at ¶ 63.

In order to state a prima facie claim of retaliation, “a plaintiff must adduce evidence sufficient to permit a rational trier of fact to find (1) that she engaged in protected activity under [Title VII], (2) that the employer was aware of this activity, (3) that the employer took adverse action against the plaintiff, and (4) that a causal connection exists between the protected activity and the adverse action, i.e., that a retaliatory motive played a part in the adverse employment action.” *Fincher v. Depository Trust & Clearing Corp.*, 604 F.3d 712, 720 (2d Cir. 2010) (quoting *Kessler v. Westchester County Dep't of Soc. Servs.*, 461 F.3d 199, 205-06 (2d Cir. 2006)) (alterations incorporated).

Based on the record properly before this Court, Plaintiff's claim that he suffered an adverse employment action cannot withstand summary judgment. In support of this claim Plaintiff argues that; (1) denial of BPT amounts to an adverse employment action, (2) Lt. M falsely claimed that Plaintiff introduced contraband into the prison and lost his keys within the facility, and (3) these two rationales in combination constitute an adverse act. Pl. Opp'n Br. 13-15, ECF No. 59. On the first rationale, Plaintiff is unable to point to any incident in which he was denied BPT on or after August 12, 2016. Instead, Plaintiff points to his inquiry on September 28, 2016 as to why he was not receiving more BPT. The undisputed facts make clear this email “does not allege who denied him the opportunity to perform BPT, when he was denied the opportunity to perform BPT, or how many times he was denied the opportunity to perform BPT.” E.D.N.Y. L.R. 56.1 Statement ¶ 60, ECF No. 63. Thus, there is no evidence that such a denial even occurred during the applicable period, let alone evidence to determine whether a

denial of BPT could qualify as an adverse employment action. Plaintiff's claim is therefore unable to survive summary judgment on these grounds.

Plaintiff's second rationale similarly fails. The claims that Lt. M made false claims that Plaintiff lost his keys and introduced contraband stem from incidents that undisputedly occurred in 2014, well before the August 12, 2016, cutoff. As such, the factual allegations underpinning this rationale are time-barred and cannot be considered as evidence of an adverse employment action. *See* 29 C.F.R. § 1614.105(a)(1).

Finally, Plaintiff's claim that these acts examined together amount to one adverse act cannot withstand summary judgment. Plaintiff is correct that acts which do not amount to an adverse action on their own may, when taken together, satisfy the standard. *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010). However, as there is no evidence properly before this Court to support either of Plaintiff's claims, there is similarly no evidence to support those claims in combination. I therefore recommend that summary judgment be granted as to Plaintiff's discrete act claims.

## **II. Plaintiff's Hostile Work Environment Claims.**

In addition to claims based on discrete acts, Plaintiff also claims he was subjected to a hostile work environment on the basis of sex in violation of Title VII. While much of Plaintiff's factual allegations are time-barred as to his discrete act claims, the 45-day period operates differently in claims of hostile work environment. *Tassy v. Buttigieg*, 51 F.4th 521, 531 (2d Cir. 2022). "Because hostile work environment claims by their very nature involve repeated conduct over a long period of time, the Supreme Court explained that, as long as any act contributing to the hostile work environment claim falls within the [relevant] period, 'the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.'"

*Spence v. Bukofzer*, No. 15-CV-6167 (ER), 2017 WL 1194478, at \*6 (S.D.N.Y. Mar. 30, 2017) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002)).

In defense of these claims, Defendant argues that: (1) no reasonable jury could determine that Plaintiff was subjected to a hostile work environment and (2) even if Plaintiff's claim could survive summary judgment, Defendant is entitled to summary judgment based on the *Faragher-Ellerth* defense. I will analyze each argument in turn.

**a. Defendant's Hostile Work Environment Claim.**

In order to demonstrate a hostile work environment under Title VII "a plaintiff must show that 'the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003) (quoting *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir.2002)). This standard has three components. First, "it is 'axiomatic' that in order to establish a sex-based hostile work environment under Title VII, a plaintiff must demonstrate that the conduct occurred because of [his] sex." *Alfano*, 294 F.3d at 374 (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir.2001)). Second, the alleged conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment." *Terry*, 336 F.3d at 148. (internal quotations omitted). Lastly, the "victim must also subjectively perceive that environment to be abusive." *Id.*

*i. Discrimination on the Basis of Sex.*

Defendant argues that Plaintiff is unable to show a link between Plaintiff's harassment and his sex because of Plaintiff's numerous written complaints, only one ever directly states that he was experiencing harassment based on his sex. *See* Def. Br. 20, ECF No. 56. It is undisputed that while an employee at the MDC, Plaintiff authored approximately ten emails or memoranda

alleging mistreatment by Lt. M and other MDC staff and of these only one explains that Lt. M sought a romantic relationship with Plaintiff. Def. Br Exhibits D-O, ECF Nos. 58-4-58-15.

However, Defendant's argument does not address multiple instances in Plaintiff's testimony in which Plaintiff was subjected to disparaging remarks plainly on the basis of sex. During both tours of duty at the MDC, Plaintiff testified that Lt. M would use slurs typically directed at both women and gay men whenever Plaintiff would reject her advances. Pl. Opp'n Br. 2-4, ECF No. 59. Similarly, Plaintiff testified that Lt. M would tell him to "be a man" and question the size of his genitalia when he refused her. *Id.* In the most extreme alleged incident of harassment, Lt. M sat on Plaintiff's desk, opened her legs in front of him, and propositioned Plaintiff for sex. *Id.* at 4. When rebuked, Lt. M allegedly disparaged Plaintiff with such slurs and comments and confiscated his personal items. *Id.* These "sex-specific and derogatory terms" used by Lt. M and her overt sexual advances could reasonably lead a jury to conclude that Plaintiff was subjected to harassment based on his sex. *Pucino v. Verizon Wireless Commc'ns, Inc.*, 618 F.3d 112, 117-18 (2d Cir. 2010).

Furthermore, Plaintiff further alleges sex-neutral behavior that could reasonably be inferred to be discriminatory based on sex. *Id.* at 117. "There is little question that incidents that are facially sex-neutral may sometimes be used to establish a course of sex-based discrimination—for example, where the same individual is accused of multiple acts of harassment, some overtly sexual and some not." *Id.* at 118-119. While Plaintiff has occasionally complained of misconduct by other individuals, Lt. M remained the central figure in the majority of Plaintiff's allegations. This sex-neutral harassment, such as Lt. M confiscating Plaintiff's personal items, hyper scrutinizing Plaintiff's performance, and denying or re-assigning his requested BPT time began after Plaintiff rejected Lt. M's offers for a sexual relationship. Pl. Opp'n Br., 4-5, 8-9; ECF No.

59. And while circumstantial evidence alone may be sufficient to transform facially sex-neutral harassment into sex-based harassment, the record also contains evidence of statements made by Lt. M herself indicating her behavior was due to Plaintiff rejecting her advances. *Pucino*, 618 F.3d at 117-18. After allegedly locking Plaintiff in a unit by not providing all the necessary keys for Plaintiff's post, Lt. M called Plaintiff stating "don't think I forgot the past and how you played me . . . I don't take no for an answer," in an apparent reference to Plaintiff's rejections. Pl. Opp'n Br. 9; ECF No. 59. Thus, despite the fact the Plaintiff did not allege sexual harassment in the majority of his complaints, the record contains sufficient evidence for a jury to reasonably conclude that Plaintiff's harassment was due to his sex.

*ii. Objective Hostility.*

Demonstrating an objectively hostile work environment is a fact specific inquiry and while the standard "is high, [this Circuit has] repeatedly cautioned against setting the bar too high." *Terry*, 336 F.3d at 148. Courts in this Circuit look to the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id* (internal quotations omitted).

In arguing that Plaintiff has failed to establish an objectively hostile work environment, Defendant again focuses entirely on the contents of Plaintiff's memos. Def. Br. 19-21. Not only do these memos demonstrate a frequency of at least ten instances of alleged harassment by Lt. M against Plaintiff, Defendant's argument ignores other evidence in the record that Lt. M allegedly made an overt sexual proposition to Plaintiff, repeatedly called him sex and sexual orientation-based slurs when he refused, and repeatedly uses both sex-based and sex-neutral forms of harassment against Plaintiff. In a similar case, *Cruz v. Coach Stores, Inc.*, this Circuit held that a

plaintiff had raised a triable question of fact as to her hostile work environment claim where the head of Human Resources frequently used racial slurs and would repeatedly back plaintiff “into the wall” when having conversations with her. 202 F.3d 560, 571-72. The “physically threatening nature of” the conduct in *Cruz* brought the case “over the line separating merely offensive or boorish conduct from actionable sexual harassment.” *Id* at 572. Similarly, Plaintiff in this case maintains Lt. M used slurs in referring to him and physically sought a sexual relationship from him by sitting on his desk and spreading her legs despite Plaintiff already declining her advances. Furthermore, the alleged sexual conduct at issue here is, in some degree, more extreme than in *Cruz*, at least so far as Plaintiff here is alleging an overt sexual advance by a supervisor as opposed to physical behavior with sexual subtext. *See id.* Viewing the record in the most favorable light to the nonmoving party, Plaintiff has successfully demonstrated a triable issue of fact as to the objective hostility of his workplace.

iii. *Subjective Hostility.*

Lastly, Defendant’s claim that Plaintiff cannot show that he subjectively viewed the environment at the MDC as hostile because he willingly returned and even stated he was happy to do so is without merit. Def. Br. 22; ECF No. 56. The relevant inquiry for determining subjective hostility is whether “the conditions under which [an employee’s] tasks must be performed have been altered for the worse.” *Terry*, 336 F.3d at 148. Assuming, *arguendo*, that that the environment was indeed the same in 2014 when Plaintiff returned as it was in 2008, that argument does not address the pattern of escalation laid out in Plaintiff’s testimony. *See* E.D.N.Y. L.R. 56.1 Statement ¶ 17, ECF No. 63. Not only did Lt. M’s most egregious alleged act of sexual harassment occur after Plaintiff returned in 2014, but Plaintiff also clearly demonstrated his subjective awareness of the hostile environment by writing over ten emails or

memos requesting ways to avoid working with Lt. M. While only one of these memos directly alleges sexual misconduct, that inquiry, as discussed above, is wholly separate from Plaintiff's subjective perception of the environment. I therefore recommend that the Court find there is sufficient evidence in the record for Plaintiff's hostile work environment claim to survive summary judgment.

**b. Defendant's *Faragher-Ellerth* Defense.**

When facing claims of hostile work environments by employees, employers may have access to an affirmative defense colloquially referred to as the *Faragher-Ellerth* defense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). This defense, which absolves employers of liability for the actions of supervisors, is only available where either: "(1) the employee's supervisor took no tangible employment action, which involves an official company act, against the employee; or (2) any tangible employment action taken against the employee was not part of the supervisor's discriminatory harassment." *Ferraro v. Kellwood Co.*, 440 F.3d 96, 101 (2d Cir. 2006) (internal quotations omitted). Plaintiff does not argue that the defense is inapplicable to this case on either ground, and instead argues that the elements of the defense have not been satisfied. Pl. Opp'n Br. 22-23. As such, I presume at this stage that the defense is applicable and proceed to the substance of the defense.

To satisfy the *Faragher-Ellerth* defense an employer must show: "(1) the employer exercised reasonable care to prevent and correct promptly any discriminatory harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ferraro*, 440 F.3d at 101 (quoting *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765) (internal quotations

omitted). Determining whether an employer has exercised reasonable care is a fact-specific inquiry and while an employer can demonstrate reasonable care by showing it had in place an antiharassment policy at the time of the employee's employment that fact alone "is not always dispositive." *Id* at 102. When faced with an actual complaint, how and how quickly that antiharassment policy is implemented "is another important factor in determining whether a defendant can satisfy the first prong of its affirmative defense." *Setelius v. Nat'l Grid Elec. 23 Servs. LLC*, No. 11-CV-5528 (MKB), 2014 WL 4773975, at \*25 (E.D.N.Y. Sept. 24, 2014).

Plaintiff and Defendant's differing accounts of MDC's response to Plaintiff's March 25, 2016 memos create a clear and genuine issue of material fact which precludes summary judgment on the first prong of Defendant's *Faragher-Ellerth* defense. Defendant claims that Plaintiff's only complaint specifically alleging sexual harassment was first made known to the MDC on May 23, 2016, which was referred to the DOJ for immediate investigation two days later.<sup>2</sup> E.D.N.Y. L.R. 56.1 Statement ¶¶ 56, 64, ECF No. 63. Defendant however claims that this complaint was first made on March 25, 2016, via email and the MDC failed to act until May 23. Pl. Opp'n Br. 7-8, ECF No. 59. While courts in this Circuit have found an employer to act reasonably where a complaint is acted upon within days, the same have also found an employer's delay of one month to interview an employee regarding a complaint precluded a summary judgment finding on the employer's reasonableness. *Compare Gonzalez v. Beth Israel Med. Ctr.*, 262 F. Supp. 2d 342, 356-57 (S.D.N.Y. 2003) (granting summary judgment and finding an

<sup>2</sup> Plaintiff also argues that many of his previous complaints went unaddressed by MDC management. *See e.g.*, Pl. Opp'n Br. 8, ECF No. 59. However, it is uncontested that that only Plaintiff's March 25, 2016, memorandum specifically mentioned sexual harassment. Rule 56.1 Statement ¶ 54, ECF No. 63. Because "generalized complaints" are insufficient to provide "notice . . . as required to trigger a duty to use reasonable care to respond," the relevant inquiry here is in how the MDC responded once it was on notice of actual sexual harassment, not Plaintiff's more generalized complaints. *See Setelius v. Nat'l Grid Elec. 23 Servs. LLC*, No. 11-CV-5528 (MKB), 2014 WL 4773975, at \*25 (E.D.N.Y. Sept. 24, 2014).

employer acted reasonably where a finding of sexual harassment was made within eleven days of the initial complaint), with *Bennett v. New York City Dept. of Corrections*, 705 F.Supp. 979 (S.D.N.Y. 1989) (declining to grant summary judgment or find an employer acted reasonably where employer waited four weeks to contact complainant). Thus, whether the first prong of the *Faragher-Ellerth* defense is satisfied is likely to turn on which version of events is deemed more credible. While the Defendant may well be correct that the MDC did not receive notice of the complaint until May of 2016 and acted nearly immediately, that determination is best left to a jury. As such, summary judgment is inappropriate as to the first prong of the *Faragher-Ellerth* defense.

### CONCLUSION

For the reasons given, I recommend that the Court GRANT Defendants' motion for summary judgment as to Plaintiff's discrete act claims and DENY the motion as to Plaintiff's hostile work environment claim.

### OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See *Frydman v. Experian Info. Sols., Inc.*, 743 F. App'x 486, 487 (2d Cir. 2018); *McConnell v. ABC-Amega, Inc.*, 338 F. App'x 24, 26 (2d Cir. 2009); *Tavarez v. Berryhill*,

No. 15-CV-5141 (CS) (LMS), 2019 WL 1965832, at \*30 (S.D.N.Y. May 1, 2019); *see also* *Thomas v. Arn*, 474 U.S. 140 (1985).

**SO ORDERED.**

\_\_\_\_\_  
/s/  
Steven L. Tiscione  
United States Magistrate Judge  
Eastern District of New York

Dated: Central Islip, New York  
February 10, 2023

**Applicant Details**

First Name **Robert**  
 Middle Initial **N.**  
 Last Name **Brewer**  
 Citizenship Status **U. S. Citizen**  
 Email Address [rnbrewer@umich.edu](mailto:rnbrewer@umich.edu)

Address  
**Address**  
**Street**  
**950 Greene St., Apt. 404**  
**City**  
**Ann Arbor**  
**State/Territory**  
**Michigan**  
**Zip**  
**48104**  
**Country**  
**United States**

Contact Phone Number **2483459178**

**Applicant Education**

BA/BS From **University of Michigan-Ann Arbor**  
 Date of BA/BS **May 2019**  
 JD/LLB From **The University of Michigan Law School**  
<http://www.law.umich.edu/currentstudents/careerservices>  
 Date of JD/LLB **May 10, 2024**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **Michigan Law Review**  
 Moot Court Experience **No**

**Bar Admission****Prior Judicial Experience**

Judicial Internships/  
 Externships **No**

Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Bagley, Nicholas  
nbagley@umich.edu  
734-615-7049

Logue, Kyle  
klogue@umich.edu  
734-936-2207

Halberstam, Daniel  
dhalber@umich.edu  
734-763-4408

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

June 12, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I am a rising third-year law student at the University of Michigan Law School writing to apply for a clerkship in your chambers for your next available term. As the Managing Editor of the *Michigan Law Review* and Co-Chair of our Environmental Law Society, I have learned first-hand the importance of sound legal leadership, and I am excited about the opportunity to learn from you and grow as an aspiring future leader of the legal profession. As I was born in New York City and much of my family still resides in the region, I am keen to return to the East Coast for a clerkship in your chambers to begin my legal career there.

As a public school teacher and Teach For America corps member, I greatly developed my professional skills and reinforced my commitment to public service. At Michigan Law, I continue to strengthen my research and writing skills. After being elected Managing Editor of the *Michigan Law Review*, I have honed my leadership skills through my broad mandate overseeing the internal operations of the journal, from content selection to editing to publication. From setting our production schedule, interacting with authors, and running our Executive Committee, this experience has taught me the importance of collaboration and accountability in legal leadership. My wide-ranging course load also allows me to indulge my intellectual curiosity and deepen my understanding of the law across many fields, ranging from the civil and criminal litigation systems, legal history, entrepreneurship, and international law.

I am also actively involved in the wider law school community. This year, I had the privilege of serving as a Co-Chair of our Environmental Law Society, and I am an active member of the Black Law Students Association. I hope to combine my broad range of legal experiences while continuing to grow as a lawyer and a leader through the exciting work of a federal clerkship in your chambers.

Please find my resume, law school transcript, undergraduate transcript, and a writing sample attached for your review, as well as letters of recommendation from the following professors:

- Professor Kyle Logue, klogue@umich.edu, (734) 936-2207
- Professor Nicholas Bagley, nbagley@umich.edu, (734) 615-7049
- Professor Daniel Halberstam, dhalber@umich.edu, (734) 763-4408

Thank you very much for your time and consideration.

Sincerely,

Robert N. Brewer

## Robert Newman Brewer

950 Greene Street, Apt. 404, Ann Arbor, MI 48104  
(248) 345-9178 | [rbrewer@umich.edu](mailto:rbrewer@umich.edu) | he/him/his

### EDUCATION

#### UNIVERSITY OF MICHIGAN LAW SCHOOL

*Juris Doctor*

Ann Arbor, MI  
Expected May 2024

Honors: Dean's Scholarship

Activities: Managing Editor, *Michigan Law Review* Vol. 122  
Co-Chair, Environmental Law Society  
Student Associate, Michigan Climate Venture  
Member, Black Law Students Association  
Former Student Attorney, Civil-Criminal Litigation Clinic

#### UNIVERSITY OF MICHIGAN

*Bachelor of Arts* in Environmental Science, Minor in Business  
Honors: University Honors Winter 2016, Fall 2016, Winter 2017  
Graham Sustainability Scholar

Ann Arbor, MI  
Graduated May 2019

Activities: Chair, Sustainability Subcommittee, College of LSA Student Government

### EXPERIENCE

#### KELLER ROHRBACK LLP

*Summer Associate*

Seattle, WA  
July 2023 – August 2023

#### WILSON SONSINI GOODRICH & ROSATI PC

*Summer Associate*

San Francisco, CA  
May 2023 – July 2023

#### NATIONAL WILDLIFE FEDERATION, GREAT LAKES REGIONAL CENTER

*Legal Intern*

Ann Arbor, MI  
May 2022 – August 2022

- Researched and briefed issues across a variety of legal frameworks, from civil procedure to administrative law to tribal policy, for use in litigation, internal policy-making, and public-facing reports

#### PUEBLO DISTRICT 60 SCHOOLS, RONCALLI STEM ACADEMY

*Middle School Science Teacher, Teach For America Corps Member*

Pueblo, CO  
August 2020 – June 2021

- Designed and taught NGSS-aligned curriculum in a student-centered virtual learning environment
- Served as a member of the Building Leadership Team focusing on remote instruction support

#### DENVER PUBLIC SCHOOLS, DMLK EARLY COLLEGE HIGH SCHOOL

*Associate High School Science Teacher, Teach For America Corps Member*

Denver, CO  
August 2019 – July 2020

- Designed and taught high school chemistry and earth science curriculum to classes of 15-30+ students
- Demonstrated particularly significant growth in linguistic and proficiency-based lesson differentiation

#### UNIVERSITY OF MICHIGAN GRAHAM SUSTAINABILITY INSTITUTE

*Education Programs Assistant*

Ann Arbor, MI  
September 2017 – April 2019

- Recruited undergraduate and graduate students for selective environmental scholarship programs
- Directed and supported events, retreats, and symposiums ranging in size from 20-100+ attendees

### ADDITIONAL

**Languages:** English (native), French (intermediate)

**Interests:** Casual musician and artist; competent video and board gamer; avid football (soccer) player and fan

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Issue Date: 06/10/2023

Page 1

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Brewer, Robert  
Student#: 00246168



*Paul R. Johnson*  
University Registrar

| Subject | Course Number | Section Number | Course Title | Instructor | Load Hours | Graded Hours | Towards Program | Credit Grade |
|---------|---------------|----------------|--------------|------------|------------|--------------|-----------------|--------------|
|---------|---------------|----------------|--------------|------------|------------|--------------|-----------------|--------------|

### Fall 2021 (August 30, 2021 To December 17, 2021)

|     |     |     |                                 |                 |      |      |      |    |
|-----|-----|-----|---------------------------------|-----------------|------|------|------|----|
| LAW | 510 | 003 | Civil Procedure                 | Nicholas Bagley | 4.00 | 4.00 | 4.00 | A  |
| LAW | 530 | 002 | Criminal Law                    | Barbara Mcquade | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 580 | 003 | Torts                           | Kyle Logue      | 4.00 | 4.00 | 4.00 | A- |
| LAW | 593 | 009 | Legal Practice Skills I         | Jessica Lefort  | 2.00 |      | 2.00 | S  |
| LAW | 598 | 009 | Legal Pract: Writing & Analysis | Jessica Lefort  | 1.00 |      | 1.00 | S  |

**Term Total** GPA: 3.666 **15.00** **12.00** **15.00**

**Cumulative Total** GPA: 3.666 **12.00** **15.00**

### Winter 2022 (January 12, 2022 To May 05, 2022)

|     |     |     |                                    |                    |      |      |      |    |
|-----|-----|-----|------------------------------------|--------------------|------|------|------|----|
| LAW | 520 | 003 | Contracts                          | Kristina Daugirdas | 4.00 | 4.00 | 4.00 | B+ |
| LAW | 540 | 003 | Introduction to Constitutional Law | Don Herzog         | 4.00 | 4.00 | 4.00 | A- |
| LAW | 594 | 009 | Legal Practice Skills II           | Jessica Lefort     | 2.00 |      | 2.00 | S  |
| LAW | 660 | 001 | Boundaries of Citizenship          | Rebecca Scott      | 3.00 |      | 3.00 | P  |
| LAW | 846 | 001 | Impact Litigation                  | Dan Korobkin       | 1.00 | 1.00 | 1.00 | A  |

**Term Total** GPA: 3.555 **14.00** **9.00** **14.00**

**Cumulative Total** GPA: 3.619 **21.00** **29.00**

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Page 2

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Brewer, Robert  
Student#: 00246168



*Paul R. Johnson*  
University Registrar

| Subject   | Course Number | Section Number | Course Title   | Instructor                 | Load Hours   | Graded Hours | Credit Towards Program | Grade |
|---|---------------|----------------|--|----------------------------|--------------|--------------|------------------------|-------|
| <b>Fall 2022 (August 29, 2022 To December 16, 2022)</b> |               |                |  |                            |              |              |                        |       |
| LAW   | 664           | 002            | European Union Law                                   | Daniel Halberstam          | 3.00         | 3.00         | 3.00                   | A-    |
| LAW   | 729           | 001            | Innovation Platform                                  | Adrian Ohmer               | 3.00         |              | 3.00                   | P     |
| LAW   | 805           | 001            | Environmental Justice                                | Oday Salim                 | 2.00         | 2.00         | 2.00                   | A-    |
| LAW   | 920           | 001            | Civil-Criminal Litigation Cln                        | Mira Edmonds               | 4.00         | 4.00         | 4.00                   | B+    |
|   |               |                |  | Victoria Clark             |              |              |                        |       |
| LAW   | 921           | 001            | Civil-Criminal Litig Cln Sem                         | Mira Edmonds               | 3.00         | 3.00         | 3.00                   | B+    |
|   |               |                |  | Victoria Clark             |              |              |                        |       |
| <b>Term Total</b>                                       |               |                |  | <b>GPA: 3.466</b>          | <b>15.00</b> | <b>12.00</b> | <b>15.00</b>           |       |
| <b>Cumulative Total</b>                                 |               |                |  | <b>GPA: 3.563</b>          |              | <b>33.00</b> | <b>44.00</b>           |       |
| <b>Winter 2023 (January 11, 2023 To May 04, 2023)</b>   |               |                |  |                            |              |              |                        |       |
| LAW   | 560           | 001            | Property   | Emily Prifogle             | 4.00         | 4.00         | 4.00                   | B     |
| LAW   | 577           | 001            | Intellectual Property Survey                         | David Blankfein-Tabachnick | 3.00         | 3.00         | 3.00                   | B+    |
| LAW   | 669           | 001            | Evidence   | Sherman Clark              | 3.00         | 3.00         | 3.00                   | B+    |
| LAW   | 842           | 001            | Env'tl Law: Gaps & Uninten Conseq                    | Andrew Buchsbaum           | 3.00         | 3.00         | 3.00                   | A     |
| LAW   | 885           | 003            | Mini-Seminar   | Emily Prifogle             | 1.00         |              | 1.00                   | S     |
|   |               |                | Law in Rural America: Cows, Courts & Country Lawyers |                            |              |              |                        |       |
| <b>Term Total</b>                                       |               |                |  | <b>GPA: 3.369</b>          | <b>14.00</b> | <b>13.00</b> | <b>14.00</b>           |       |
| <b>Cumulative Total</b>                                 |               |                |  | <b>GPA: 3.508</b>          |              | <b>46.00</b> | <b>58.00</b>           |       |

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Page 3

# The University of Michigan Law School

## Cumulative Grade Report and Academic Record

Name: Brewer, Robert  
Student#: 00246168



*Paul R. Peterson*  
University Registrar

| Course   |        | Section | Load                       |                            | Graded | Towards |               |
|--|--------|---------|----------------------------|----------------------------|--------|---------|---------------|
| Subject  | Number | Number  | Course Title               | Instructor                 | Hours  | Hours   | Program Grade |
| Fall 2023 (August 28, 2023 To December 15, 2023) |        |         |                            |                            |        |         |               |
| Elections as of: 06/10/2023                      |        |         |                            |                            |        |         |               |
| LAW  | 569    | 001     | Legislation and Regulation | Daniel Deacon              | 4.00   |         |               |
| LAW  | 628    | 001     | Animal Law                 | Nicolas Cornell            | 3.00   |         |               |
|  |        |         |                            | Anne Carlotte Marie Peters |        |         |               |
|  |        |         |                            | Schwenke                   |        |         |               |
| LAW  | 634    | 001     | Water Wars/Great Lakes     | Andrew Buchsbaum           | 3.00   |         |               |
| LAW  | 677    | 001     | Federal Courts             | Gil Seinfeld               | 4.00   |         |               |

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## University of Michigan Law School Grading System

### Honor Points or Definitions

| Through Winter Term 1993 |     | Beginning Summer Term 1993 |     |
|--------------------------|-----|----------------------------|-----|
| A+                       | 4.5 | A+                         | 4.3 |
| A                        | 4.0 | A                          | 4.0 |
| B+                       | 3.5 | A-                         | 3.7 |
| B                        | 3.0 | B+                         | 3.3 |
| C+                       | 2.5 | B                          | 3.0 |
| C                        | 2.0 | B-                         | 2.7 |
| D+                       | 1.5 | C+                         | 2.3 |
| D                        | 1.0 | C                          | 2.0 |
| E                        | 0   | C-                         | 1.7 |
|                          |     | D+                         | 1.3 |
|                          |     | D                          | 1.0 |
|                          |     | E                          | 0   |

#### Other Grades:

- F Fail.
- H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.
- I Incomplete.
- P Pass when student has elected the limited grade option.\*
- PS Pass.
- S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.\* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)
- T Mandatory pass when student is transferring to U of M Law School.
- W Withdrew from course.
- Y Final grade has not been assigned.
- \* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

### Third Party Recipients

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UNIVERSITY OF MICHIGAN LAW  
701 South State Street  
Ann Arbor, MI 48109

NICHOLAS BAGLEY  
Professor of Law

June 12, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I'm writing to recommend Robert Brewer for a clerkship. Bobby is an outstanding law student and will make a terrific clerk.

Bobby was in my Civil Procedure class in the fall of 2021, when we were still masking in classrooms. And since I was on leave in 2022 to take a job in state government, I didn't actually get to see his face until well into his second year in law school. That didn't stop Bobby from making an impression, however. From the outset, I could tell that he was a serious and committed law student. He was sharp, too, and did well on my cold-calls.

I wasn't surprised, then, when Bobby got a solid A on his exam, no small achievement in an 80-person, steeply curved class. I pulled his exam, and Bobby was especially strong on a question that probed the students' understanding of summary judgment. The fact pattern involved a patient who claimed a hospital harmed her because she was prescribed an opioid without full disclosure of the possibility that she might become addicted. The problem for the patient was that she had signed a form attesting to her receipt of the warning. As Bobby explained:

[The hospital's] signed waiver is an uncontested piece of evidence showing that Yang, at one point, did attest to receiving the information. The [physician assistant's] deposition does not further either side's case definitively. Therefore, it appears Yang does not have enough evidence to constitute more than a metaphysical doubt regarding the receipt of the information in question, so [the hospital's] motion for summary judgment is likely to be granted.

I think Bobby got this one exactly right, and his ability to explain why in clear, precise prose is impressive—especially on a timed, in-class exam.

I'll close by saying that Bobby is a curious, kind law student. He joined Teach for America in 2019, right before the pandemic hit. As a former Teach for America teacher myself, I know how challenging that job can be, and I can only imagine what he had to manage when his school district moved fully virtual. I don't know if that experience accounts for his maturity and his work ethic, but he has those virtues, wherever he came by them.

Again, Bobby will make an excellent clerk and I encourage you to take a close look at his application.

Best regards,

Nicholas Bagley

Nicholas Bagley - nbagley@umich.edu - 734-615-7049

UNIVERSITY OF MICHIGAN LAW SCHOOL  
625 South State Street  
Ann Arbor, Michigan 48109

Kyle D. Logue  
Douglas A. Kahn Collegiate Professor of Law

June 12, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I am writing on behalf of Robert (Bobby) Brewer, a second-year student at the University of Michigan Law School who is applying for a clerkship in your chambers. I am confident that Bobby will be a fantastic judicial clerk, and I give him my highest recommendation.

Bobby was a student in my Torts class in the fall 2022 term, and, judging by his in-class participation and performance on the exam, he was among the best students in that class. Most law students at the University of Michigan are very smart; possessing the ability to understand the assigned cases, to extract the cases' holdings, and to articulate the strongest arguments for both the positions advanced by the plaintiff and defendant. One does not get admitted to Michigan without the necessary intellectual ability to manage these tasks. Bobby, however, has an uncanny ability to identify and understand the most important issue in every case, the issue on which the case actually turns. Further, he can make a very persuasive and eloquent argument for how that issue ought to be resolved. What is more, he can do these things better than most of even the best Michigan Law students.

His performance on the exam was similarly exceptional. Law school exams are designed to test not only knowledge of the material, but the ability to write well and argue for a particular legal position in a persuasive but balanced way. They are also a test of how well one can marshal authorities for one's position, while distinguishing the important cases that might seem to apply, but in fact do not. Bobby did all of this on my Torts exam, notwithstanding the time constraints placed on him by the in-class exam format. His answers were thorough (covering every issue hidden in the questions), and they were clearly and cogently argued. His writing style is simple, direct, and devoid of any distracting or extraneous verbiage. Overall, I consider Bobby's analytical and writing abilities to be among the best of the many first-year students I taught in the 2021-22 academic year. I have no doubt that he can handle any work you assign him.

Two further pieces of evidence that advocate Bobby will be an amazing law clerk should be emphasized. First, in the fall of 2022 he, together with one other law student, organized an extraordinarily successful environmental law conference. They chose the discussion topics, selected and invited the speakers (both outside of and within the Law School), they developed the agenda, and they oversaw the conference from beginning to end. As academic conferences go, it was a tour de force, and it was organized almost entirely by two law students. Second, Bobby is the Managing Editor of the Michigan Law Review. This not only shows how well he has done in law school; it also signifies how well respected he is by his peers. Being Managing Editor will give Bobby additional experience doing basic research, editing, and proofreading, as well as experience running one of the leading academic law journals in the country.

I truly believe Bobby Brewer is one of the best clerkship applicants on the market this year. If there is anything more I can tell you about Bobby, feel free to email or call me.

Sincerely yours,

Kyle Logue  
Douglas A. Kahn Collegiate Professor of Law  
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**UNIVERSITY OF MICHIGAN LAW SCHOOL**  
625 South State Street  
Ann Arbor, Michigan 48109-1215

**Daniel H. Halberstam**  
Eric Stein Collegiate Professor of Law  
Director, European Legal Studies

June 12, 2023

The Honorable Beth Robinson  
Federal Building  
11 Elmwood Avenue  
Burlington, VT 05401

Dear Judge Robinson:

I am delighted to write in support of Robert Brewer, who has applied for a clerkship in your chambers. Bobby is a highly thoughtful young lawyer with a bright future. He will make a fine clerk in whatever chambers he joins.

I came to know Bobby when he took my EU law course last fall. The course considers the constitutional structure, basic rights, and some fundamental statutes (e.g. anti-discrimination and consumer protection laws) of the EU. The class is often conducted in a comparative manner, with students drawing on their knowledge of corresponding U.S. law.

Bobby was always prepared and ready to engage with excellent insights into the readings. Even when he was not volunteering, I knew I could call on him whenever necessary, as he would jump in with something highly productive to move our discussion forward. It was a pleasure having him in class.

Bobby chose the option of writing an independent research paper instead of taking the exam (which about half the students choose). He did an excellent job digging into the application of antitrust law to a proposed breakaway soccer league, considering that we did not cover antitrust law in class at all. Bobby researched this rather complex area of law entirely on his own and deftly explained the background rules of how sporting clubs and federations generally fare under applicable antitrust law. He then analyzed very effectively how these rules should and likely would apply to FIFA and UEFA (soccer's world-wide and European umbrella organizations, respectively) and their actions punishing local soccer clubs willing to join the proposed exclusive "European Super League". The paper was a pleasure to read.

I have also had the opportunity to speak with Bobby outside of class, not just about our class materials but also about matters pertaining to various Michigan Law Review policies. In these conversations, Bobby consistently struck me as exceptionally mature, thoughtful, and considerate. I am certain he would bring the same qualities to his work in chambers.

In summary, I recommend Bobby Brewer to you without qualification. Please do not hesitate to contact me with any further questions you may have.

Yours sincerely,

Daniel H. Halberstam

Daniel Halberstam - dhalber@umich.edu - 734-763-4408

**Robert Newman Brewer**

950 Greene Street, Apt. 404, Ann Arbor, MI 48104  
(248) 345-9178 | [rnbrewer@umich.edu](mailto:rnbrewer@umich.edu) | he/him/his

**Writing Sample**

This writing sample is based on a paper I wrote for a class on European Union law with Professor Daniel Halberstam in the Fall of 2022. I chose to write on the topic of European competition law, or antitrust law, in the context of sport organizers as applied to the dispute between the European Super League and UEFA, which is currently pending before the European Court of Justice. This sample is my own work and reflects comments I received from Professor Halberstam after it was graded; I have edited it myself since in response to those comments as well as other updates to legal landscape since the class concluded.

Robert N. Brewer

Writing Sample: EU Law

When Sporting Regulators Won't Play Ball:  
Rejecting the "Sporting Exception" in EU Competition Law

Robert N. Brewer\*

*Abstract: One of the biggest controversies in European football right now is the fight between UEFA, Europe's continental football association, and the European Super League (ESL), a proposed breakaway league composed of some of the biggest clubs and commercial names in the sport. After the ESL clubs announced their intentions to formally create a new "league" in April 2021, UEFA took swift and strict action to oppose the project, announcing it would sanction both players and clubs that participated in the ESL. Though the ESL project ostensibly collapsed shortly thereafter due to a combination of player, state, and fan pressure, three of the founding clubs quickly sued UEFA and FIFA for allegedly anti-competitive behavior and still hold out hope of reviving the project; a decision on the dispute is expected from the ECJ in spring of 2023 after the advocate general released their opinion in December 2022. This paper argues that European competition law, derived from both the Treaties and ECJ case law, should apply to the dispute, and that sports governing bodies such as UEFA, acting as competition organizers, should not be entitled to a "sporting exception." I come to this conclusion by first outlining the framework of European competition and sport law through the relevant treaty articles and ECJ case law, followed by their intersection in the seminal Meca-Medina and MOTOE cases, and finally arguing that finding UEFA's actions as impermissibly anti-competitive is the natural extension of these precedents.*

Table of Contents:

- Part I: Introduction
- Part II: Legal Background
  - Competition Law Background
    - Treaty Articles
    - ECJ Case Law
  - Sport Law Background
    - Treaty Articles

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\* J.D. Candidate, University of Michigan Law School, 2024; B.A., University of Michigan, 2019.

Robert N. Brewer

Writing Sample: EU Law

- ECJ Case Law
  - Intersection
- Part III: ESL Case
  - Background of the Controversy
  - Legal Analysis
- Part IV: Conclusion
  - Policy Implications
  - AG Opinion of December 15, 2022

## I. INTRODUCTION

One of the biggest controversies in European football right now is the fight between UEFA, Europe's continental football association headquartered in Switzerland,<sup>1</sup> and the European Super League (ESL), a proposed breakaway league composed of some of the biggest clubs and commercial names in the sport; a case arising out of the dispute recently reached the European Court of Justice (ECJ) and a decision is expected in the coming months.<sup>2</sup> The conflict mirrors a similar recent schism in the world of golf, between the incumbent PGA Tour and the Saudi Arabian-backed breakaway LIV Golf tour,<sup>3</sup> and is just one of a number of controversies UEFA and FIFA, the global football regulator also headquartered in Switzerland,<sup>4</sup> has faced in recent years. From the wide-ranging corruption inquiry spearheaded by the United States in

<sup>1</sup> *About UEFA: Administration*, UEFA, <https://www.uefa.com/insideuefa/about-uefa/administration/> (last visited Dec. 15, 2022).

<sup>2</sup> Ali Walker, *UEFA Battles Super League at EU's Top Court*, POLITICO (July 11, 2022), <https://www.politico.eu/article/super-league-uefa-begin-battle-at-eus-top-court/>.

<sup>3</sup> Ewan Murray, *Rebel LIV Tour and Golf's Civil War Overshadowed Everything at the Open*, THE GUARDIAN (July 18, 2022), <https://www.theguardian.com/sport/2022/jul/18/rebel-liv-tour-and-golfs-civil-war-overshadowed-everything-at-the-open>. The PGA Tour and LIV Golf, together with the European DP World Tour, recently announced a controversial merger ending their litigious dispute, which has already drawn further antitrust scrutiny. *See, e.g.*, Daniel Kaplan & Brendan Quinn, *Can PGA Tour, PIF Deal Survive Antitrust Concerns?*, THE ATHLETIC (June 8, 2023), <https://theathletic.com/4591143/2023/06/08/pga-tour-pif-antitrust/>.

<sup>4</sup> *Contact FIFA*, FIFA, <https://www.fifa.com/about-fifa/organisation/contact-fifa> (last visited Dec. 15, 2022).